

FEB 28 1997

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL., RESPONDENTS.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL., RESPONDENTS

On Petitions for a Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

JOINT APPENDIX
VOLUME II
PAGES 299-820

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JOINT APPENDIX VOLUME II

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
09/26/85	ORDER by Judge Neaher enjoining delivery of Title I services on premises of sectarian schools
03/26/86	MANDATE of court of appeals affirming Judge Neaher's decision
10/25/95	MOTION by deft. Chancellor of the Board of Education of the City of New York, for relief from the judgment dated Sept. 26, 1985.
10/25/95	MEMORANDUM by Chancellor of Board in support of motion for relief from the judgment dated Sept. 26, 1985.
11/03/95	ORDER dated 10/26/95 that 78cv1750 be assigned to Judge Gleeson as related to 88cv96.
12/26/95	COPY LETTER dated 12/19/95 from W. Scott Simpson, Esq. to counsel enclosing Secretary, Dept. of Education's response to chancellor's motion.
01/10/96	AFFIRMATION of Stanley Geller, attorney for plaintiffs in opposition to defendant Chancellor of the Board of Education of the

- 01/19/96 MOTION by defendant-intervenors for relief from judgment.
- 01/19/96 MEMORANDUM by defendant-intervenors in support of motion for relief from judgment.
- 01/19/96 REPLY Declaration of Margaret Weiss, Director of the Bureau of Nonpublic School Reimbursable Services of the Bd. of Ed.
- 01/22/96 RESPONSE by U.S. Dept. Education to defendant-intervenors' motion for relief from judgment.
- 05/09/96 MOTION HEARING before Judge Gleeson on 5/9/96, regarding motion for relief from the judgment dated Sept. 26, 1985. Decision reversed.
- 05/13/96 STIPULATION AND ORDER dated 5/6/96 allowing intervention and adding a defendant. 1) The fourteen parents named in paragraphs a through m shall be permitted to intervene as defendants in this case. 2) Yolanda Aguilar, Lillian Colon, Miriam Martines, and Belinda Williams shall be permitted to withdraw as defendant-intervenors. 3) The Board of Education of the City School District of the City of New York shall be added as a party defendant. 4) The caption of this case shall be amended as in the attachment to this Stipulation. (signed by Judge John Gleeson)

defendant. 4) The caption of this case shall be amended as in the attachment to this Stipulation. (signed by Judge John Gleeson)

- 05/24/96 ORDER denying motion for relief from judgment dated Sept. 26, 1985.
- 05/24/96 LETTER, dated 5/15/96 from Kevin T. Baine to Judge Gleeson, for the purpose to supplement the record on the issues of Rule 60(b) motions.
- 06/07/96 Chancellor and Board of Education's NOTICE OF APPEAL filed (96-6160)
- 06/18/96 NOTICE OF CROSS APPEAL by Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, Allen H. Zelon. Service made by clerk.
- 06/18/96 NOTICE OF APPEAL by Defendant-Intervenor Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then, Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, Rosemarie Vasquez.
- 07/03/96 Appellants-cross-appellees Chancellor and Agostini briefs and joint appendix filed

- 08/02/96 Appellees-cross-appellants Felton, et al. brief filed
- 08/05/96 Appellee Secretary, U.S. Dept. of Education brief filed
- 08/16/96 Reply briefs of Chancellor/Board of Education and Agostini filed
- 08/23/96 Reply brief of Felton, et al. filed
- 08/30/96 ORAL ARGUMENT before KEARSE, MAHONEY C.JJ., POLLACK, D.J.
- 08/30/96 Judgment filed; judgment of the district court is AFFIRMED substantially for the reasons stated in Judge Gleeson's Memorandum and Order dated 5/20/96 by detailed order of the court without opinion filed. [Per Judge Kearse] (96-6160, -6180, -6181)
- 10/07/96 Petitions for writs of certiorari filed by Agostini and Chancellor/Board of Education
- 10/15/96 MANDATE of court of appeals issued
-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN, BARBARA
HRUSKA, MERYL A.
SCHWARTZ, ROBERT H. SIDE
and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION and
CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF
NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN
COLON, MIRIAM MARTINES,
and BELINDA WILLIAMS,
Defendant-Intervenors.

NOTICE OF
MOTION BY
DEFENDANT
CHANCELLOR
FOR RELIEF
FROM
JUDGMENT

78 CV-1750
(ERN)

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PLEASE TAKE NOTICE that, upon the declaration
of Margaret O. Weiss, dated October 16, 1995, and the
charts and exhibits annexed to the declaration and all other

pleadings and proceedings herein, defendant Chancellor of the Board of Education of the City of New York, will move this Court, on a date to be determined after this case has been reassigned (the judge who was previously assigned the case, the Honorable Edward R. Neaher, is now deceased), at the United States Courthouse, for the Eastern District Court of New York, located at 225 Cadman Plaza East, Brooklyn, New York, for an order pursuant to Rule 60 of the Federal Rules of Civil Procedure, granting relief from this Court's Judgment, dated September 26, 1985, and granting such other relief as to this Court seems just and proper.

Dated: New York, New York
October 24, 1995

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA,
MERYL A. SCHWARTZ
A. SCHWARTZ, ROBERT H.
SIDE and ALLEN H.
ZELON,

DECLARATION

78 CV-1750 (ERN)

Plaintiffs,

- against-

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION,
CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF
NEW YORK, and THE BOARD OF
EDUCATION OF THE CITY OF
NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA
WILLIAMS,

Intervenor-Defendants.

-----X

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I am responsible for implementing various federal programs which provide instructional and support services to students who attend private schools within New York City. One of these federal programs is Chapter 1 of Title I of the federal Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 2701, et seq. ("Chapter 1").

2. I have been an educator for over 31 years and have worked in remedial education, as a teacher, supervisor and administrator, for over 27 years. I have worked for the Board of Education of the City School District of the City of New York ("the Board" or "the Board of Education") since 1965.

3. I have worked for the Bureau of Nonpublic School Reimbursable Services ("the Bureau") since 1972. In that year, I became a field supervisor for corrective reading for the Chapter 1 (then called Title 1) program, and in 1974 I became the coordinator of the Chapter 1 Reading Skills Center program, which serves severely disabled readers. As coordinator, I was responsible for training and supervising the teaching and administrative staff of the program, developing courses of instruction for over 400 children and implementing the program. In 1979, I became Assistant Director of the Bureau, and in 1985, I became Director of the Bureau.

4. I hold a Masters of Science in Education and have completed an additional 30 graduate credits in School Supervision and Administration. I hold two professional teaching licenses and two professional certifications in school administration from the New York State Education Department. I also hold one teaching license and three licenses in education administration from the Board of Education.

5. I submit this declaration in support of the motion of defendant Chancellor of the City School District of the City of New York (denominated in the caption as the Chancellor of the Board of Education of the City of New York), which seeks relief from this Court's Judgment, dated September 26, 1985, *aff'd*, 787 F.2d 35 (2d Cir. 1986), which permanently enjoined the Chancellor "from using public funds for any plan or program under [Chapter 1] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City...." (Slip opinion, at 2. A copy of the judgment is annexed as Exhibit "1.")

6. By resolution dated July 7, 1995 the Board of Education of the City School District of the City of New York (hereafter "the Board of Education"), authorized the commencement of legal proceedings seeking relief from the judgment. The Board of Education concluded that these proceedings should be commenced because of the adverse effects of the judgment, and the clear indication, based on the opinions of several Justices of the United States Supreme Court, that the judgment no longer reflects current law. In pertinent part, the resolution authorizes that relief be sought from the judgment:

... in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United States Supreme Court Justices that *Aguilar v. Felton* should be revisited....

(A copy of the resolution is annexed as Exhibit "2.")

Brief Overview of the Chapter 1 Program

7. Chapter 1 was first enacted in 1965. The statute provides federal funds for remedial, supplementary education and support services for elementary and secondary school students. To be eligible, a student must have below grade level educational achievement in reading and/or mathematics and reside within the attendance boundaries of a participating public school located in a low income area. (20 U.S.C. §§ 2721(a), 2723(a); 34 C.F.R. § 200.6(c).)

8. The statute has always provided that both public school and private school students are eligible for Chapter 1 services. Implementing regulations promulgated by the United States Department of Education required that private school students receive services that are "comparable" to those provided to public school students. More recent statutory enactments and regulations continue that requirement by mandating that there be "equitable" participation of eligible students in the Chapter 1 program, without regard to whether they attend public or private schools. (20 U.S.C. § 2727(a), (b)(2); 34 C.F.R. §§ 76.654(a), 200.50(a)(1), 200.71(b).) (Effective July 1, 1995, pursuant to the Improving America's Schools Act of

1994, Pub. L. No. 103-382, 108 Stat. 3517, the name of the program will change from "Chapter 1 of Title I" to simply "Title I." However, in this declaration, the program is referred to as Chapter 1, and the cited statutory provisions are those in effect prior to July 1, 1995, since this motion primarily concerns a time period prior to July 1, 1995.)

9. Pursuant to the statute, Chapter 1 services are normally implemented by a local educational agency ("LEA"), under the supervision of a state educational agency ("SEA"). (20 U.S.C. § 2722(b).) The Board of Education is the LEA for the City of New York.

10. It should be noted that the City of New York is also subdivided into thirty-two community school districts, each of which has a community school board. A variety of functions are delegated to the community school boards by the Board of Education. (New York Education Law §§ 2564, 2590, *et seq.*) A few of the community school districts administer a portion of the Chapter 1 funds that are allocated to serve the private school students in their districts. However, the Chancellor, through my Bureau, administers the vast majority of the Chapter 1 funds that are allocated to private school students in New York City. Accordingly, except as otherwise noted, the numbers and other details provided herein refer to the Chapter 1 services for private school students administered by the Chancellor.

11. The Board of Education is the largest LEA in the nation, and our Chapter 1 program is the largest in the nation. In school year 1993-94 (the most recent year for which complete statistics are available), the program served 259,097 students. Of these, 237,200 students attended public school and 21,897 students attended private school.

12. The basic educational composition of Chapter 1 services for private school students, as provided by the Board of Education, has remained essentially unchanged, from Chapter 1's inception in 1965 until today. Only secular, remedial instruction is provided. Instruction is given in three basic areas--reading, mathematics and English as a Second Language.

13. In addition, the program provides clinical and guidance support services for eligible children who have emotional or family problems which interfere with their academic performance. The clinical services are provided by social workers and psychologists, and the guidance services by guidance counselors.

14. The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools.

15. These same basic services have been provided over the three decades that the Chapter 1 program has been in existence. These services have always been designed to supplement, and not supplant, the students' regular classroom instruction. What has changed, as a result of this litigation, have been the methods by which the services have been delivered to students who attend private religious schools. This case reached the United States Supreme Court, which held, in *Aguilar v. Felton*, 473 U.S. 402 (1985) ("*Aguilar*"), that the Board's provision of Chapter 1 services by publicly employed teachers and other professional employees inside religious schools violated the Establishment Clause. This Court's September 26, 1985 judgment, enjoining this method of providing Chapter 1 services, followed.

Chapter 1 Services for Private Schoolchildren Before the Judgment

16. When the Chapter 1 program began, in 1965, the Board of Education provided services to private school students after the students' regular school day was completed. However, it was quickly concluded that these after school services for private school students were not as effective as, and therefore not comparable to, the Chapter 1 services for public school students, which were provided during the regular school day. Both the students and teachers were tired. In addition, parents had serious concerns about the younger children having to get home in the dark during the winter months, and older children had scheduling conflicts created by jobs and other activities.

17. The Board of Education consulted with other LEAs around the country, and learned that they were experiencing similar difficulties with after school Chapter 1 programs. Indeed, one district court subsequently found that an after school Chapter 1 program for private school students was not comparable to the regular school day program for public school students. Based on our own experience, and the reported experience of other school districts, the Board of Education concluded that Chapter 1 services for private schoolchildren should be provided during the regular school day, to ensure that they would be comparable to the Chapter 1 services for public schoolchildren.

18. Accordingly, after the first year of the program, the Board provided Chapter 1 services to all private schoolchildren during the course of their regular school day, by sending its teachers, guidance counselors, and other professional and instructional employees into

classrooms in the private schools (including the religious schools). These classrooms were designated as Board of Education Chapter 1 rooms and in most instances were used exclusively for the Chapter 1 program.

19. As is clear from the record in this case, the method of providing Chapter 1 services to religious school students prior to the judgment, in-school services during the regular school day, was highly successful from an educational standpoint. Annual reports by independent evaluators found that private school students who participated in the program showed measurable improvement in overcoming their educational achievement deficits. The program was also far less expensive to operate than an off-premises program. (For a complete description of the pre-judgment program, the Court is referred to the Joint Appendix which was submitted to the United States Supreme Court, a copy of which is annexed as Exhibit " 3. ")

20. The Board's program was not atypical; beginning in 1965 or soon thereafter, throughout New York State, and upon information and belief, throughout the nation, Chapter 1 services for children attending religious schools were largely provided inside the religious schools by publicly employed teachers and other professionals. (Letter dated July 12, 1985 from Gordon Ambach, Commissioner of the New York State Education Department, to William Bennett, Secretary of the United States Department of Education, annexed hereto as Exhibit "4.")

Developing Alternative Service Delivery Methods After this Court's 1985 Judgment

21. During the 1984-85 school year, the Board provided Chapter 1 services to 172,263 public school

students and 21,958 private school students, for a total of 194,221 students. All but 52 of the participating private school students attended religious schools, and were therefore affected by this Court's judgment. This meant that new methods of delivering Chapter 1 services had to be devised for these nearly 22,000 private schoolchildren, who attended 252 private religious schools. (As used hereafter in this declaration, the term "private school" refers to those schools whose students' receipt of Chapter 1 services is affected by this Court's judgment following the *Aguilar* decision.)

22. In August 1985, the United States Department of Education issued a written Guidance on *Aguilar v. Felton* and Chapter 1 (a copy of the Guidance is annexed hereto as Exhibit "5.") In question and answer number 4, the federal government stated that an LEA's Chapter 1 application could not be approved, and Chapter 1 funds could not be expended, unless the LEA's Chapter 1 program provided for equitable services to private school children. Thus, the Board was legitimately concerned that if its post-*Aguilar* Chapter 1 services for private schoolchildren were not equitable, its entire Chapter 1 program, for both public and private schoolchildren, would be jeopardized.

23. On September 26, 1985, this Court issued its judgment permanently enjoining the provision of Chapter 1 services by public school teachers and guidance counselors on the premises of sectarian schools. The judgment included a stay until the beginning of the 1986-87 school year, to give the Board an opportunity to develop alternative means of delivering Chapter 1 services to the students who attended these sectarian schools. (Exhibit " 1, " annexed.)

24. By memorandum dated July 22, 1985, the

New York State Department of Education identified four possible alternatives for the delivery of Chapter 1 services to private schoolchildren. These four suggested alternatives were: 1) in public schools; 2) in neutral sites; 3) in mobile or portable vans equipped as classrooms and 4) through instructional technology. (Memorandum dated July 22, 1985 from Robert D. Stone, General Counsel of the New York State Department of Education to District Superintendents, etc., annexed hereto as Exhibit "6").

25. These four suggested alternatives are the four delivery methods which the Board has used to comply with this Court's judgment following *Aguilar* (post-*Aguilar* delivery methods"). For purposes of this declaration, the four methods are referred to as: (1) "public school sites"; (2) "MIUs," which are mobile instructional units; (3) "leased sites," which are sites leased by the Board of Education from private entities and (4) "CAI," which is "computer-assisted instruction."

26. The Board has used public school sites, leased sites and MIUs since the 1986-87 school year, when post-*Aguilar* delivery methods were first implemented. The Board began using CAI in the 1987-88 school year.

27. As discussed further below, providing Chapter 1 services to students inside their own schools is preferable to using the post-*Aguilar* delivery methods. Judge Friendly had noted that alternatives to in-school services "are almost certain to be less effective, more costly, or both." *Felton v. Secretary U.S. Dep't of Educ.*, 739 F.2d 48, 71 (2d Cir. 1984). Judge Friendly's prediction was accurate; the alternatives have been less effective and more costly than in-school services.

Public School Sites

28. A public school site is a room or rooms in a public school that are used to provide Chapter 1 services for private schoolchildren. The rooms may be located anywhere in the building. Obtaining public school sites for use during the regular school day is difficult, because of the lack of excess space in many public schools, and the educational and logistical problems created by transporting children to and from a public school site. In 1985-86, school overcrowding was so severe in some neighborhoods, that certain public schools were busing their own students to different schools for the entire school day. As discussed further below, the space shortage in public schools has become far worse since 1986.

29. The use of public school sites also creates a loss of instructional time, which is a serious concern for Chapter 1 students. The Board therefore sought to minimize travel time, and established a maximum one way vehicular travel time between the two schools of ten minutes. The necessary limitation on travel time further restricts the availability of appropriate public school sites. Insofar as an alternative site is closer to the private school than is the public school site, it is educationally preferable to use the alternative site.

30. To minimize the loss of instructional time, most private school students are transported between the private school and the Chapter 1 public school site by mini-vans or buses. These vehicles are owned and operated by private companies which are under contract to the Board to transport students between their homes and schools at the beginning and end of the school day, and are thus available for Chapter 1 purposes from approximately 9 a.m. to 2:30

p.m. Private school students who attend a public school site which is within one block of their own school normally walk.

31. For the 1986-87 school year, the Board was able to offer Chapter 1 services at public school sites to students attending 194 private schools; however the offer was only accepted by students from 52 private schools. The result was a dramatic decrease in the number of private school students receiving Chapter 1 services. In school year 1986-87, the first year in which the post-*Aguilar* program was implemented, the overall number of participating private school students decreased by approximately 50% from the number participating in the prior school year.

32. Objections to the public school sites, as expressed by many private school principals, included: the loss of instructional time caused by travel (it was noted that the travel time computed by the Board was just for travel between the two schools, and that additional time was lost in walking to and from classrooms, particularly those on upper floors); drug dealing and other criminal activities near the private school, the public school or both; heavy traffic and high accident rates on the proposed route between the two schools; and the reluctance or unwillingness of many parents to have their children leave their school building or travel during the school day. Some private school principals indicated that their students would attend public schools which were closer to the private school than the public school site offered; however there was no available space in those public schools.

33. Since the post-*Aguilar* delivery methods were instituted, there has been a continuing decline in the number of public school sites which have been utilized in the Chapter

1 program. In school year 1986-87, 3,578 students attending 52 private schools received their Chapter 1 services at 49 public school sites. During 1993-1994, 1,219 students from 16 private schools received services at 15 public school sites (either exclusively or as part of a combination program, as discussed below).

34. Most of the decrease in public school utilization is due to increased overcrowding in the public schools. Of the 34 public school sites which were dropped between 1987 and 1994, 23 were lost because the public school needed the classroom space for its own students' regular educational program.

35. On October 31, 1986, the student enrollment in New York City's public schools was 940,208. On October 31, 1994, the student enrollment was 1,034,235. This is an increase of 10%, in just 8 years.

36. As is fully described in a January 1995 report by the Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where Do We Go from Here? (a copy is annexed hereto as Exhibit "7"), public school overcrowding became particularly severe starting in the late 1980's. The major cause has been a rapid increase in enrollment growth since 1989. In addition, in 1988, the Board significantly reduced class size, which further increased overcrowding. The rate of increased enrollment is now 21,000 students per year, due primarily to immigration and the high number of births. The current growth rate is expected to continue into the next century. (Exhibit "7," pp. ES1, 1, 3 (figure 2).)

37. As the Comptroller's Report indicates, the school system is now so crowded that 90,000 students,

which is 9% of the public school population, lack regular classroom seats. Since the construction of new school buildings is too costly and too slow a process to address the great and growing space need, other solutions, some drastic, are being explored. These include double shifts (students attend school on different shifts), a year-round school calendar and large-scale busing of students to other, underutilized schools. (Exhibit "7," pp. ES1, 30-50).

38. For purposes of the Chapter 1 program, the overcrowding situation is even worse than the overall figures suggest, since a majority of the Chapter 1 private school students attend school in areas where the public schools are most overcrowded. In the 1993-94 school year, 59% of the private school Chapter 1 students attended schools which were located in the 15 most overcrowded community school districts. As explained in the Comptroller's Report, increased immigration is the major cause of the increase in enrollment, and immigrants frequently congregate in particular neighborhoods. As a result, the overcrowding is far more severe in these neighborhoods. (Exhibit "7," pp. 4-8, 12-22). Since eligibility for Chapter 1 includes a requirement that the student reside within the attendance boundaries of a participating public school in a low-income area, the Chapter 1 programs are often concentrated in areas where large numbers of immigrants reside and the public schools are most crowded.

Mobile Instructional Units ("MIUs")

39. As discussed above, when the Board first created its post-*Aguilar* delivery methods for the 1986-87 school year, there were many more public school sites available than in subsequent years. However, even in 1986, no appropriate public school sites could be found for the

Chapter 1 students of 48 private schools.

40. Accordingly, mobile instructional units were obtained for these eligible private school students. Based on the number of Chapter 1 students in these private schools, and the types of services provided to these students, it was determined that 70 MIUs would be required.

41. The MIUs are large vehicles equipped as classrooms. They have been specially designed to comply with the stringent New York City health and safety code requirements for space occupied for the instruction of children.

42. The MIUs have also been specially designed to meet the needs of the Chapter 1 program. Under New York State Department of Education guidelines, which apply to both public and private school students, the maximum size for a Chapter 1 class with one teacher is 10 students. However, space is also required for students' sessions with guidance counselors, social workers or school psychologists, and for conferences between Chapter 1 staff and private school staff or private school parents.

43. The MIUs are expensive, and the Board accordingly sought to maximize the use of each MIU, and thereby minimize the number of MIUs and their total cost. The interior of each MIU contains a folding partition; when the partition is closed, the larger section can accommodate a class of 10 students and a teacher, and the smaller section, which seats 3 or 4 students, can simultaneously accommodate either a small English as a Second Language class, or a guidance session, or a parent-teacher conference, etc.

44. The Board had no facility in which a large number of vans could be garaged, stored, cleaned, repaired and maintained. Other school systems had found such facilities very expensive to build and operate, and in their experience, vandalism and insurance coverage were also expensive. Accordingly, the MIU contract requires that the supplier also provide garage, maintenance, repair, cleaning, security and insurance.

45. The contract further requires the supplier to build and maintain spare vehicles, which can be used as replacements when necessary, to avoid disruptions in service. Finally, the contract requires that the supplier provide a driver for each MIU, who not only drives the MIU between the garage and the private school, but remains in the MIU or the area surrounding the MIU during the school day to provide security. Security is a serious concern in regard to the MIUs, since they are parked in the open on public streets, usually in high-crime areas. There have been incidents, including one shooting, which occurred right outside an MIU.

46. Three photographs, showing the exterior and the interior of MIUs leased from Ferdinand Arrigoni, Inc. (d/b/a New York Bus Service) are annexed hereto as Exhibit "8." The serious security concerns associated with the MIUs are reflected in the design of these vehicles. As the photographs show, the windows in the classroom areas are all relatively high and small, and the windows are covered with a heavy wire grid.

47. Each MIU bears the words "New York Bus Service" on all four sides in large, contrasting lettering, and bears a large decal of the Board of Education seal on two sides (see photographs at Exhibit "8.") The MIUs do not

obtain electricity from the private schools; each MIU carries a generator which supplies all electrical power. There are no telephones in the MIUs. Each MIU is equipped with a walkie-talkie, which is used by the driver for emergency communication with the private school.

48. There is limited storage space on the MIUs for equipment, material and supplies. However, since the space is not unlimited, the Chapter 1 teacher usually stores surplus supplies and materials in the private school. The teacher replenishes supplies from the surplus stock approximately once a month, or less frequently. There are no bathrooms or lunchrooms on the MIUs.

49. When in service, the MIUs are parked on a public street near the private school whose students are receiving services; the MIUs are never parked on private school property. The MIUs are generally parked either on the same block as, or around a corner from, an entrance to each private school. When not in use for Chapter 1 purposes, the MIUs are garaged in a facility owned or leased by the supplier.

50. The only instruction provided in MIUs is secular Chapter 1 instruction. They are not used for instruction in religious subjects, nor for the private schools' educational programs.

51. The Board designed specifications to meet the applicable code requirements and educational needs, and then solicited competitive bid proposals from private contractors for the leasing of MIUs. During the first three school years of our post-*Aguilar* program, the Board of Education leased 70 MIUs. The Board then entered into an agreement to lease an additional 58 MIUs, which were delivered over the

next two school years. By the end of 1990-91, delivery was complete and the Board was leasing 128 MIUs. No additional MIUs have been leased; indeed, in the 1994-95 school year, the number of MIUs was reduced to 126.

52. The number of students receiving services in MIUs (either exclusively or as part of a combination program, as discussed below), has increased over the years. In 1986-87, 5,503 students from 72 private schools received services in MIUs; in 1993-94, 11,622 students from 141 private schools received services in MIUs.

Leased Sites

53. A leased site is a building or part of a building that the Board leases and uses to provide Chapter 1 services to private school students. From the time of the *Aguilar* decision to the beginning of the 1986-87 school year, the Board made inquiries concerning nearly 500 potential leased sites. Approximately 475 of the original 500 potential leased sites were rejected for one or more reasons: they were not religiously neutral; they had no space available for Chapter 1 purposes; the landlord was unwilling to rent the site to the Board; they were unsuitable for classroom instruction or they would have required extensive, lengthy, and costly renovations. Of the original 500 potential leased sites, 190 were owned by religious organizations. The Board rejected 141 of these 190 sites because they were not religiously neutral.

54. The Board approves leased sites without regard to the religious affiliation, if any, of the owner. Most but not all of the leased sites used for Chapter 1 services are owned by religiously-affiliated organizations. However, neither the interiors nor the exteriors of the buildings where

the leased sites are located bear any visible religious symbols. If such symbols are present, they are either removed or covered. The leased sites are identified as Board of Education facilities, by signs that read: "New York City/ Board of Education/Chapter 1 Facility".

55. Further, the only activity which occurs at each leased site is secular Chapter 1 instruction. The leases for these sites provide that, for the duration of the lease, the Board of Education has exclusive use and occupancy of the site and no religious activity or instruction may occur anywhere in the building where the site is located.

56. Each of the Board's leased sites, is in a building that is separate from the private school building(s) whose students are served at the sites. Near the beginning of the 1986-87 school year, the Board leased thirteen sites to provide Chapter 1 services to private school students.

57. Of these thirteen leased sites, twelve were closer to at least one of the private schools whose students they served than was the nearest public school with available space (and the thirteenth site was approximately the same distance). Thus, the use of these leased sites reduced the travel time and increased the regular classroom instructional time for the students.

58. In 1986-87, 1,580 students from 17 private schools received Chapter 1 services in leased sites. Commencing in January 1987, the annual rental for these thirteen sites was \$4.75 per square foot, which was at the low end of the range of the Board's usual cost for similar leased space.

59. The use of leased sites has continued in

similar fashion. In the 1993-94 school year, 1,601 students from 14 private schools received Chapter 1 services in eleven leased sites (either exclusively or as part of a combination program, as discussed below).

Computer-Assisted Instruction

60. In computer-assisted instruction ("CAI"), private school students receive Chapter 1 instruction through computers that are linked by modem or by dedicated telephone lines to a Board of Education office. The Board began using CAI to serve private school students in the 1987-88 school year.

61. CAI utilizes both desk-top computers that are installed in the private schools, usually in dedicated rooms used exclusively for CAI (referred to as "CAI rooms"), and lap-top computers that are distributed to private school students for use at home.

62. Chapter 1 teachers are not present in the private school during CAI use. When students use the computers installed in the private schools, data recording their work is transmitted electronically to a Board of Education office, where Chapter 1 teachers monitor the students' work, print and review reports of their progress, and adjust each student's curriculum as appropriate.

63. The only Board of Education employee who is present in the CAI room while the private school students work on the computers is a non-instructional technician (referred to as a "CAI technician"). These technicians are non-professional employees. The CAI technician's primary duty is to maintain order among the students. They also take attendance, maintain student records and perform elementary

functions with the computers, specifically turning them on and off, rebooting them and bringing up the program, if necessary.

64. There are many electronic and physical safeguards to insure that the CAI computers are not usable for any purpose other than Chapter 1 instruction. Some of the computers are "dumb" terminals that do not have their own central processing units or disk drives. These "dumb" terminals automatically connect themselves to the main computer located at a Board of Education site when they are turned on; the main computer transmits the Chapter 1 lessons electronically to the terminals in the private schools.

65. The remainder of the CAI computers installed in the private schools are personal computers that have their own central processing units and floppy disk drives. The floppy disk drives are covered by locked security devices. The Board of Education has sole possession of the keys to the security devices.

66. Not only is the software used in these CAI computers limited to that installed by the Board or at its direction, but the Board also electronically limits access to these computers to students enrolled in the Chapter 1 program. The Board prohibits students who are not registered for CAI from using the Chapter 1 computers. Private school staff are also prohibited from using the CAI computers at any time.

67. The Board gives each student enrolled in CAI a password. To access a CAI computer, a student must enter his or her password, which automatically places the student in the program designated for him or her by a Chapter 1 teacher. The computers located in the private

schools cannot be activated or used in any other way, except to print a student progress report pursuant to an electronic command.

68. All but a few of the computers installed in the private schools are located in separate rooms, in which no other activity occurs while Chapter 1 CAI is given ("CAI rooms"). The only persons who may be present in the CAI rooms during CAI sessions are the students and the Board's CAI technician. Religious symbols in the CAI rooms are prohibited.

69. Almost all CAI rooms are used only for Chapter 1 instruction. In three schools in which CAI sessions are held only two or three times a week, the CAI rooms are used for other purposes on the days when there are no CAI sessions.

70. In a few private schools, the small number of Chapter 1 eligible students warranted the installation of only one computer. Beginning in April 1989, one CAI computer (each a "dumb" terminal type) was installed in some of these schools in a room that the schools may use for other purposes (such as a supply room) at any time. Through the end of school year 1990-91, this arrangement has been used in a total of four private schools. None of those four schools continue to use this arrangement; however, this arrangement has been implemented in two other private schools since 1991.

71. In addition to the CAI computers that are installed in private schools, the Board of Education has acquired and distributed "lap-top" computers for use in the homes of some Chapter 1-eligible private school students. These lap-tops have been electronically "encrypted" so that

they are only usable for Chapter 1 instruction.

72. Each lap-top is a PC that has only a floppy disk drive (no hard disk drive). The PC hardware (i.e., "mother board") has been altered so that the disk drive can read only the floppy disks that the Board provides with the computers. These floppy disks are dialing disks; their only capability is to automatically dial a local area network when the computer is turned on, through an internal modem, which connects the lap-top to the software company. The Chapter 1 instructional programs are then transmitted to the lap-top. The Chapter 1 teacher at the Board of Education office can electronically monitor the student's work and adjust the lessons appropriately. The process is similar to that used with the CAI computers installed in the private schools.

73. The Board selects all the software which is used in CAI. No software is used which could be diverted for religious purposes, or for any secular purpose other than CAI. For example, to ensure non-divertibility, the Board does not use wordprocessing, graphic or spreadsheet software in CAI.

74. CAI was first used in school year 1987-88, when 2,135 students from 22 private schools were served by CAI. The use of CAI has increased over the years; in 1993-94, 9,662 students from 149 private schools used CAI.

75. From an educational perspective, as the Chapter 1 achievement tests demonstrate, it is preferable for students to have face-to-face interaction with teachers, rather than to work only on computers. Therefore, the Board implemented combination services, in which private school students who receive CAI also receive some face-to-face

instruction from Chapter 1 teachers in public school sites, MIUs, or leased sites.

76. In this combination program, CAI is generally used two days per week and face-to-face instruction one day per week. The Board has been able to provide combination services to only a small portion of the students who receive CAI, because of the limited availability of public school sites, leased sites and MIUs, and because face-to-face services were declined in some instances because private school students did not want to leave their school building.

77. Combination services were offered beginning in school year 1988-89. The number of students who received combination services are a subset of the number of students who received CAI. In school year 1988-89, 1,003 students from 25 private schools received Chapter 1 combination services. In subsequent school years, the use of combination services has increased; in 1993-94, 2,115 students from 63 private schools received combination services.

Problems Created by Compliance with the Judgment

78. Compliance with this Court's judgment has created a system for provision of Chapter 1 services to private school students that is more expensive, less educationally effective and less administratively efficient than the in-school delivery of Chapter 1 services which was used for private school students prior to the judgment. In-school delivery of Chapter 1 services is in all ways preferable, and continues to be used for all public school students throughout New York City.

79. Of greatest concern, from an educational

perspective, is the time spent by students in moving between their regular classroom and their Chapter 1 site. This is time lost from their regular classroom instruction and is an especially serious concern for Chapter 1 students, since they are the students who are most in need of instruction. The public school site and leased site alternatives often entail significant travel time.

80. Additional instructional time loss and disruption is caused for both the Chapter 1 students and their regular school classmates because Chapter 1 students have to leave their school buildings to receive services at the public school sites, leased sites and MIUs, and therefore have to put on and remove outer garments. This is not a trivial disruption, since most of the Chapter 1 private school students are in the elementary school grades, and this task is often a major undertaking for young children in the winter.

81. Another consideration is safety. Most of the private schools are located in low income neighborhoods, as are most of the alternative Chapter 1 sites. Many of these neighborhoods have high rates of violent crime. An MIU parked on the street in a high-crime area is more exposed and not as secure as a school building. Walking or even driving children through high-crime areas raises safety considerations. In fact, since the post-*Aguilar* delivery methods were instituted, a few incidents have occurred which were upsetting to the students, but fortunately resulted in no harm. There was a sniper outside one school when the students were scheduled to be leaving, gangs have threatened some students, and drug dealing has occurred in the vicinity of students. The Board has considered the levels of violence and crime in particular neighborhoods in determining the appropriate method of service delivery for students of a particular school.

82. The CAI alternative avoids the instructional time loss, disruption and safety concerns created by the other post-*Aguilar* delivery methods. However, while CAI has educational value, it is not as educationally effective as direct face-to-face interaction between student and teacher. Although as a group, the Chapter 1 private school students who receive only CAI instruction do meet the New York State Department of Education's educational gain standards for the Chapter 1 program, they do not perform as well, overall, as the students who receive face-to-face instruction.

83. Further, for Chapter 1 instruction to effectively supplement the students' regular instruction in reading, mathematics or English as a Second Language, there must be coordination between the regular and Chapter 1 curricula, so that Chapter 1 instruction can supplement and reinforce the regular classroom instruction.

84. For this reason, the Chapter 1 statute and regulations and New York State Education Department guidelines mandate that the LEA's Chapter 1 program include effective strategies to coordinate the Chapter 1 curriculum with the students' regular educational programs, regardless of whether the students attend public or private school, and mandate consultation between Board of Education and private school officials to develop Chapter 1 services that effectively supplement the students' regular classroom instruction. (20 U.S.C. §§ 2722(c)(3), 2727(a), 34 C.F.R. §§ 200.51(a), 200.70.) In addition, the New York State Education Department guidelines mandate that Board of Education Chapter 1 staff and private school staff coordinate their activities to achieve the educational objectives for their students.

85. Pursuant to Guidance issued by the United

States Department of Education, the public school sites, neutral sites and MIUs are used for consultations concerning the Chapter 1 program between Board of Education and private school staff. (A copy of the June 1986 Guidance on *Aguilar v. Felton* and Chapter 1, issued by the United States Department of Education is annexed as Exhibit "9;" questions 24-28 concern consultation.) It is often extremely burdensome to hold consultations between the Board's Chapter 1 staff and the private school staff when the Chapter 1 services are given at a public school site or leased site that is located a mile or more away from the private school. The private school staff must travel to the public school or leased site for a consultation meeting.

86. An alternative is to hold consultations between the Board's Chapter 1 staff and private school staff by telephone. (See federal Guidance, Exhibit "9" annexed, question 28.) Obviously, this is not as effective as meetings, especially when the teachers need to refer to records.

87. For CAI, the situation is even more cumbersome. The "consultation" by the Board of Education Chapter 1 teacher, who is located in a Board of Education office which may be across the City from the private school, is primarily through written computer-generated student progress reports, which are printed out in the CAI room upon electronic command. These reports are then delivered by the CAI technician to the private school principal.

88. The use of the MIUs is also cumbersome and inefficient for our Chapter 1 staff. Since there is limited storage space for records on the MIUs, and since most of our staff is itinerant (approximately 66% of the teachers, 88% of the guidance counselors, and 100% of the psychologists and social workers who work fulltime, serve

students from more than one private school during the course of their workweek), these professionals must frequently carry their records and files with them on a daily basis.

Costs of Compliance with the Judgment

89. Finally, taken together, the post-*Aguilar* delivery methods are far more costly than was the pre-judgment provision of services in the private schools. The result has been a very significant expenditure of funds simply to deliver services in accordance with the judgment.

90. The Board of Education has spent \$93,245,424 for the costs of compliance with the judgment for the school years 1986-87 through 1993-94. Of these funds, \$7,920,528 were taken "off-the-top" (see discussion below), in other words, from Chapter 1 funds which could otherwise have been used to provide additional instructional and support services to both public and private (including nonsectarian) schoolchildren in New York City. For ease of comprehension, a chart has been prepared showing these expenditures, broken down by year and funding source. This chart is annexed as "Chart A" and is incorporated, as though fully set forth, herein.

91. The costs of complying with the *Aguilar* decision have been Burdensome to LEAs throughout New York State and the entire nation. Both the New York State Legislature and the United States Congress have recognized that this is a serious problem, and accordingly have made appropriations to meet some of these compliance costs.

92. After *Aguilar*, the State of New York allocated funds to cover part of the noninstructional costs incurred by LEAs in response to *Aguilar*. Section 9 of Chapter 683 of

the Laws (of New York) of 1986, provided for the apportionment of \$10 million dollars to LEAs around the State, allocated under Chapter 53 of the Laws of New York (the local assistance budget). Annual allocation of state funds under Chapter 53 began in the 1986-1987 school year, and continued through the 1990-1991 school year. No state funds have been allocated since then.

93. In 1988, the Chapter 1 statute was amended by enactment of 20 U.S.C. § 2727(d), which authorizes appropriations for "capital expenses" incurred by LEAs throughout the nation in providing equitable Chapter 1 services to private school students. Capital expenses are expenditures for noninstructional goods and services required to comply with *Aguilar*. (34 C.F.R. § 200.57(a)(2).)

94. In addition, beginning in the 1990-91 school year, the Board has been able to use approximately 15.2 million dollars in "carryover" funds to cover some of its *Aguilar* compliance costs. Carryover funds are unspent funds from prior years. These carryover funds were all originally allocated for private school students, and accrued during the early years following the judgment, because the number of participating private school students decreased dramatically during those years.

95. State funds allocated pursuant to Chapter 53, federal capital expense funds allocated pursuant to section 2727(d) and the carryover funds, have been sufficient to cover most, but not all of the Board's expenditures for compliance with the judgment. (In two years these funding sources did cover all compliance costs.) The excess expenditures (the \$7,920,528 referred to above) were taken "off the top" of the Board's total Chapter 1 allocation.

96. Regulations promulgated by the United States Department of Education require that an LEA generally take the noninstructional administrative costs of providing Chapter 1 services "off the top" of the LEA's entire Chapter 1 allocation, rather than charging such costs solely to the group of students for whom they were incurred. (34 C.F.R. § 200.52(a)(2).)

97. This off-the-top policy, which was established by the United States Department of Education prior to the *Aguilar* decision, applies to the noninstructional administrative costs of delivering Chapter 1 services to all participating students (whether they attend public or private, including non-sectarian, school).

98. Following the *Aguilar* decision, the United States Department of Education stated, in its August 1985 written Guidance, that the "off-the-top" policy should also be applied to the noninstructional costs of complying with *Aguilar*. (Exhibit "5" annexed hereto, p. 6, question 15.) This directive was later promulgated as a regulation. (34 C.F.R. § 200.52(a)(2).)

99. Although the necessity of taking funds off the top of the entire Chapter 1 allocation to meet the costs of complying with the judgment has been comparatively limited in the past, the situation will be very different in the near future.

100. New York State Chapter 53 funding ended after the 1990-91 school year and the national federal appropriation for capital expense funds, pursuant to section 2727(d), is likely to be reduced by approximately 50% for school year 1996-97. (In 1994-95, the appropriation was 41 million dollars; the United States Department of Education

has requested that Congress appropriate only 20.5 million dollars for 1996-97.) It can be anticipated that New York City's share of the reduced national appropriation for capital expenses will also be substantially reduced.

101. In addition, the 15.2 million dollars in carryover funds which were used for compliance costs will be exhausted by the end of the 1994-1995 school year. Given this elimination and reduction of funding sources for compliance costs, if the annual costs of compliance with the judgment continue at roughly the current rate of approximately 15 million dollars, then in school year 1995-96, the Board may be forced to take approximately 5 million dollars off the top of the total Chapter 1 allocation simply for compliance costs, and beginning in school year 1996-97, the Board may be forced to take approximately 10 million dollars annually off the top of the total Chapter 1 allocation simply for compliance costs. As explained above, this is money which would otherwise be used to provide additional instructional and support services to both public and private schoolchildren.

Specific Expenditures for Compliance with the Judgment

102. Expenditures for compliance with the judgment were made in four categories: shuttle transportation between the private schools and the public school and leased sites; the leasing of MIUs; the leasing of leased sites and administrative expenditures for CAI.

103. During the school years 1986-87 through 1993-1994, total expenditures in the four categories were: \$279,877 for the (identifiable) costs of shuttle transportation; \$83,729,440 for MIUs; \$1,596,095 for leased sites and \$1,625,487 for the administrative costs of CAI.

104. Again, for ease of comprehension, the expenditures made in these four categories are listed in the annexed Chart B. (The information set forth in Chart B is incorporated, as if fully set forth, herein.) The figures in Chart B indicating the amount spent in various categories (e.g., MIUs, leased sites, etc.), show the actual expenditures for items in these categories; they do not include the "indirect cost" figure added to all Chapter 1 expenditures (except for purchases of equipment) to generate funds to cover general administrative overhead. Pursuant to New York State Education Department directives, for federal funds the indirect cost figure was 6.5% of the expenditure and for state funds the indirect cost figure was 5% of the expenditure. The indirect cost expenditures are described further below.

105. To set these very significant expenditures in an appropriate perspective, the total expenditures for the Chapter 1 program in New York City for all public and private (including non-sectarian) school students are listed in the annexed Chart C. (The information set forth in Chart C is incorporated, as if fully set forth, herein). During 1986-87, the total expenditure for the Chapter 1 program in New York City, for both public and private (including non-sectarian) school students was \$190,146,061. During the intervening years, Congress appropriated additional funding for Chapter 1, and accordingly, the Chapter 1 allocation for New York City has increased. During 1993-94, total expenditures for the Chapter 1 program in New York City, for both public and private school students was \$425,440,299.

Shuttle Transportation

106. The Board of Education does not maintain

records which distinguish expenditures for shuttle transportation between the private schools and public school sites, from expenditures for transportation between the private schools and leased sites.

107. Further, pursuant to reporting requirements of the New York State Department of Education, a portion of the Board's costs of transporting private school students between public school sites and leased sites during the school years 1988-89, 1989-90, and 1990-91 were aggregated with other costs. The Board's expenditures for shuttle costs, as listed in this Declaration and in the annexed Chart B, are the identifiable expenditures.

MIUs

108. During the school years 1986-87 through 1993-94, the Board of Education paid an annual rental of \$106,934 per MIU, which covered the use of each MIU for a 6 hour and 20 minute school day, and included the costs of the driver, garage, insurance, maintenance, and repairs. The Board has the option of using one or more of the MIUs for an additional two hours per day at a cost of \$75 per hour for each MIU, and has exercised this option for a varying number of MIUs over the years.

CAI

109. Under regulations promulgated by the United States Department of Education, expenditures for computers used for CAI (as well as expenditures for CAI technicians) have been considered instructional expenditures and therefore have been charged entirely to funds allocated for private school students. (34 C. F. R. § 200.57(a)(2)(ii).) These expenditures were not paid for by funds provided under

Chapter 53 or section 2727(d), since those funds are reserved for noninstructional administrative expenditures. Similarly, these expenditures were not taken off-the-top of the entire Chapter 1 allocation, since that procedure is also reserved for noninstructional administrative expenditures. There are, however, some noninstructional administrative expenditures for CAI. These are for central office expenses, such as the salaries of central office personnel who worked with CAI.

Regular Noninstructional Administrative Costs

110. There are, of course, also general noninstructional administrative expenditures for operating the Chapter 1 program in New York City for both public and private school students. These expenditures have nothing to do with compliance with the judgment; they are simply the usual expenditures for administrative overhead, such as central office expenses.

111. In accordance with the terminology and practice adopted by the New York State Education Department, which audits, monitors and supervises the Board of Education's Chapter 1 program, the Board uses the term "indirect costs" to refer to the general administrative overhead costs.

112. A ceiling for indirect costs, expressed as a percentage of total expenditures (excluding purchases of equipment) is established annually by the New York State Education Department (which prohibits any assessment of indirect costs against purchases of equipment.)

113. The indirect cost rate for the Board of

Education during the years 1986-87 through 1993-94 was 6.5% for federal funds used in the Chapter 1 program. For the State funds provided under Chapter 53, the indirect cost rate was 5%. For recordkeeping purposes, the Board computes the indirect costs by adding a uniform 6.5% administrative charge to each component of its federal Chapter 1 budget, except purchases of equipment, which is effectively the same as deducting general administrative expenditures before breaking the budget into its various components, and implements the federal regulatory command that the noninstructional administrative costs of serving both public and private school students be charged to an LEA's total Chapter 1 funds. (34 C.F.R. § 200.52(a)(2)). For the State Chapter 53 funds, the Board added a uniform 5% administrative charge to each component of the budget funded by Chapter 53, except expenditures for equipment.

Generally Applicable Provisions of the Chapter 1 Program for Private School Students

114. The teachers and other personnel who provide Chapter 1 services to private school students in New York City are Board of Education employees. They are hired and assigned by the Board without regard to their religious affiliation, gender, race, national origin, or whether they speak languages other than English.

115. The union which represents all teachers, guidance counselors, school social workers and school psychologists employed by the Board of Education is the United Federation of Teachers ("the UFT"). These employees are assigned to union chapters, based on their work assignment. The employees in these four job titles who serve private school students in the Chapter 1 program are assigned to the "Nonpublic School Chapter" of the UFT.

I am informed, based on information provided by the UFT, that over 60% of these professional employees are of a different religious affiliation than the religious affiliation of the private schools whose students they serve.

116. This figure is consistent with the Board's own information and experience. As discussed below, approximately 86% of the private school students in the Chapter 1 program attend schools affiliated with the Roman Catholic Church. Although the Board does not ask its employees their religious affiliation, it is widely-known that a high proportion of the professional staff employed by the Board is of the Jewish faith. I am informed that it is for this reason that the public schools in New York City are closed during major Jewish holidays, whereas offices throughout New York City government remain open. Given the high proportion of Jewish staff, there has always been a concern that there would be an insufficient number of employees in attendance on major Jewish holidays to adequately staff the public schools. There is no reason to believe that the staff assigned to the Chapter 1 nonpublic school program is of a significantly different religious composition than the Board's staff in general.

117. In school year 1990-91, approximately 86% of the private school students in the Chapter 1 program attended Roman Catholic schools and approximately 8% attended Hebrew Day schools. The remaining 6% of the students attended schools that were Greek Orthodox, Lutheran, Episcopal, Ukrainian Orthodox, other denominational, or nonsectarian. These figures were not markedly different during the years 1986-87 through 1993-94.

118. My Bureau's written guidelines for our

employees provide them with instructions for carrying out their duties under the unique circumstances resulting from the judgment. The instructions are issued and distributed annually, and are designed to preserve the secular nature of the Chapter 1 program for private school students and to provide instructions concerning other matters which arise in light of the itinerant and other unusual conditions in which most of our staff perform their duties. (Copies of the guidelines for professional staff assigned to neutral (i.e., leased) sites, MIUs and CAI, and of the administrative procedures for CAI technicians, are annexed hereto as Exhibit "10".)

119. The Board of Education's collective bargaining agreement with the United Federation of Teachers, provides that every tenured professional employee receives one announced visit by a Board supervisor each year for purposes of a formal observation and evaluation. Every non-tenured professional employee receives three such announced visits per year. The same requirements govern all professional employees who work for the Board. In addition, Board supervisors make a number of unannounced visits to the Chapter 1 personnel who serve private school students. The total number of both announced and unannounced supervisory visits to each professional employee is approximately ten per school year.

120. Although, as discussed above, the Board's staff consult with the private school staff to achieve effective coordination of the Chapter 1 and regular school curricula, it is the Board's staff which determines the content and methodology of the instruction and clinical and guidance services provided through Chapter 1 to the private school students. The private school staff cannot dictate the content of instruction, or the methodology used to provide these

services.

Dated: Brooklyn, New York
October 16, 1995

[Margaret O. Weiss]
MARGARET O. WEISS

CHART A

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT
BY FUNDING SOURCE AND SCHOOL YEAR

School Year	State funds Chapter 53	Fed. funds § 2727(d)	Fed. funds Off the Top	Carryover funds	Total
1986-87	\$ 7,506,000	N.A.	\$ 169,701	N.A.	\$ 7,676,501
1987-88	\$ 7,484,000	N.A.	\$ 954,867	N.A.	\$ 8,438,867
1988-89	\$ 8,600,000	N.A.	\$ 297,221	N.A.	\$ 8,897,221
1989-90	\$ 8,507,618	\$ 1,927,585	None	N.A.	\$10,435,203
1990-91	\$ 8,250,098	\$ 3,291,362	None	\$ 1,016,462	\$12,557,922
1991-92	N.A.	\$ 7,724,044	\$ 3,562,720	\$ 3,806,097	\$15,092,861
1992-93	N.A.	\$ 9,028,082	\$ 1,823,682	\$ 4,216,335	\$15,068,099
1993-94	N.A.	\$ 9,750,078	\$ 1,112,337	\$ 4,216,335	\$15,078,750
TOTAL	\$40,348,516	\$31,721,151	\$ 7,920,528	\$13,255,229	\$93,245,424

Notes

N.A. means Not Applicable

State funding under Section 9 of Chapter 683 of the Laws (of New York) of 1986, providing for apportionment of funds allocated under Chapter 53 of the Laws of New York (the local assistance budget) was not continued after the 1990-91 school year.

Federal funding for capital expenses under 20 U.S.C. § 2727(d) was received beginning in the 1989-90 school year following the enactment of § 2727(d) in 1988.

The carryover funds, which were unused funds from the private school (including non-sectarian) students' allocation were released by the U.S. Department of Education for compliance expenditures in June 1990.

Pursuant to New York State Department of Education guidelines, the state Chapter 53 funds include a 5% indirect cost charge for all expenditures except equipment.

The other funding sources are all federal funds, and pursuant to New York State Department of Education guidelines, include a 6.5% indirect cost charge for all expenditures except equipment.

EXPENDITURES FOR COMPLIANCE WITH JUDGMENT
BY TYPE OF EXPENDITURE AND SCHOOL YEAR

School Year	MIU Costs	Leased Sim Costs	CAI Administrative Costs	Shuttle Transportation Costs	Total
1986-87	\$ 7,149,333	\$ 135,532	N.A.	\$ 26,630	\$ 7,311,495
1987-88	\$ 7,335,877	\$ 387,963	\$ 88,731	\$ 104,531	\$ 7,917,102
1988-89	\$ 7,549,249	\$ 279,082	\$ 273,032	\$ 25,248	\$ 8,126,611
1989-90	\$ 9,157,444	\$ 198,508	\$ 348,942	\$ 31,329	\$ 9,736,223
1990-91	\$11,126,541	\$ 280,402	\$ 225,711	\$ 28,211	\$11,660,865
1991-92	\$13,790,999	\$ 151,832	\$ 205,801	\$ 23,068	\$14,171,700
1992-93	\$13,810,752	\$ 75,106	\$ 237,922	\$ 24,672	\$14,148,452
1993-94	\$13,809,245	\$ 87,670	\$ 245,348	\$ 16,188	\$14,158,451
TOTAL	\$83,729,440	\$ 1,596,095	\$1,625,487	\$ 279,877	\$87,230,899

Notes -

N.A. means Not Applicable

The dollar figures above are actual expenditures - they do not include the indirect cost additions (5% for state funds and 6.5% for federal funds except for equipment) which were included in the figures in Chart A.

Shuttle Transportation Costs are not complete after the 1987-88 school year, because pursuant to New York State Education Department reporting requirements, some of these costs were aggregated with the costs of MIUs. The shuttle transportation costs presented for school year 1988-89 and for the following years, represents the identifiable costs of shuttle transportation costs; the balance of these costs are included in the total MIU costs.

CAI Costs - These expenditures are only for administrative expenses, such as salaries and equipment for central office administrative personnel who work on CAI. Pursuant to federal regulation 34 C.F.R. § 200.57(a)(2)(iii), expenditures for computers and software used for CAI, as well as the salaries of the CAI technicians, have been considered instructional expenditures. These expenditures have therefore been charged solely to Chapter 1 funds allocated for private school students, and are not included in the above table.

TOTAL EXPENDITURES FOR CHAPTER 1 PROGRAM IN NEW YORK CITY
FOR BOTH PUBLIC AND PRIVATE SCHOOL STUDENTS

BY SCHOOL YEAR

SCHOOL YEAR	TOTAL EXPENDITURES
1986-1987	\$ 190,146,061
1987-1988	\$ 197,657,498
1988-1989	\$ 257,512,021
1989-1990	\$ 327,733,794
1990-1991	\$ 363,065,833
1991-1992	\$ 382,904,292
1992-1993	\$ 419,182,808
1993-1994	\$ 425,440,299
TOTAL	\$ 2,563,642,606

Note

These total figures include the expenditures for all Chapter 1 services provided to both public and private (including non-sectarian) school students, whether centrally, by the Chancellor, or by the community school districts.

SUBSTITUTE RESOLUTION
June 7, 1995 Calendar,
Item LO-1

AUTHORIZATION TO COMMENCE LEGAL
PROCEEDINGS TO SEEK RELIEF FROM THE
JUDGMENT IN AGUILAR v. FELTON

The following resolution is presented for adoption:

WHEREAS, for twenty years prior to 1986, the Board of Education provided required remedial educational and support services to economically and educationally disadvantaged students attending nonpublic religious schools on the premises of their religious schools in accordance with Chapter 1 of the Elementary and Secondary Education Act; and

WHEREAS, by decision dated July 1, 1985, in *Aguilar v. Felton*, 473 U.S. 402 (1985), the United States Supreme Court (by a vote of five for, and four opposed) held that it was a violation of the Establishment Clause of the First Amendment to the United States Constitution to have public school teachers and support staff provide such services on the premises of religious schools; and

WHEREAS, in response to such decision, the Board of Education thereafter developed an alternative program for providing the required Chapter 1 services to economically and educationally disadvantaged students attending nonpublic religious schools, which program includes the providing of services in leased mobile instructional units, in leased neutral sites, in public schools (which space is very limited), and through a system of interactive computer technology called

computer assisted instruction; and

WHEREAS, the delivery of such services by these alternative methods has proven to be very expensive (for example, the annual leasing cost for each mobile instructional unit (which includes the services of a driver, garaging, maintenance repairs, insurance) is \$106,934; the total current annual cost for leasing 126 units is \$13,473,684; and the total annual cost for leasing 10 neutral sites which are presently used is \$105,624) thereby significantly reducing the limited funds now available for providing needed Chapter 1 remedial services to both public school students and nonpublic school students; and

WHEREAS, since federal regulations require that non-instructional administrative costs for providing Chapter 1 services be taken "off the top" of the Board's total Chapter 1 allocation from the federal government (34 C.F.R. §200.52 (a)(2)), Chapter 1 funds may therefore only be divided between public and private school students after these administrative expenses are deducted; and

WHEREAS, anticipated reductions in available funding to cover these service delivery costs means that in the future additional scarce resources will have to be diverted from providing needed remedial and support services to both public and nonpublic school students to cover these service delivery costs; and

WHEREAS, the Board of Education and the Chancellor also believe that it is educationally preferable to provide remedial and support services on the premises of students' regular schools, as is done for public school students, in that:

- 1) the use of mobile instructional units, neutral sites, and public school sites involves the loss of much needed regular classroom instructional time for Chapter 1 students because of the time used to travel to offsite premises;
- 2) in the case of computer assisted instruction, there is no simultaneous face-to-face instruction by a teacher to support and reinforce the computerized instruction; and
- 3) entitled Chapter 1 economically and educationally disadvantaged students in religious schools who are all performing below grade level in one or more subjects can ill afford such instructional time loss or other factors which negatively affect the delivery of services; and

WHEREAS, in 1994, in the United States Supreme Court's decision in *Board of Education of Kiryas Joel School District v. Grumet*, 114 S.Ct. 2481 (1994), a majority of the Justices indicated that the Supreme Court should overrule or reconsider *Aguilar v. Felton*, *supra*; now, therefore, be it

RESOLVED, that in light of the significant costs associated with the alternative service delivery methods now used which divert scarce funds from the provision of remedial services to both public and nonpublic school students, the educational superiority of on-premise services, and the opinion of several United States Supreme Court Justices that *Aguilar v. Felton* should be revisited, the Board of Education hereby authorizes the Corporation Counsel of the City of New York to take those steps necessary to, commence legal

proceedings, as soon as possible, seeking relief from the judgment in *Aguilar v. Felton* and, if necessary, reconsideration and overruling of the Supreme Court's holding in *Aguilar v. Felton*.

E X P L A N A T I O N

Chapter 1 requires the Board of Education to provide remedial and support services to eligible students attending nonpublic religious schools.

The Board of Education provided effective remedial and support services to Chapter 1 economically and educationally disadvantaged eligible students on the premises of their nonpublic religious schools for twenty (20) years, without any proven evidence of entanglement between the religious school and the public school system; classrooms, materials, and staff were maintained separate and distinct from the educational program provided by the religious school.

Given that significant funds are required to be expended on the alternative methods now necessary because of the *Aguilar v. Felton* decision, thereby diverting scarce resources from eligible public and nonpublic school students, as well as the loss of instructional time of students attending nonpublic religious schools, the Board and Chancellor believe it necessary to seek relief from the judgment in *Aguilar v. Felton*. Given the views expressed by a majority of the Justices in the *Kiryas Joel* case, there is a serious question whether *Aguilar v. Felton* commands the continuing support of a majority of the Court.

The Board and the Chancellor believe that the Chapter 1 program in New York City presents a proper and compelling case for the reconsideration of *Aguilar v. Felton*. Indeed,

the Board and Chancellor believe it would be irresponsible in this time of national, state, and city fiscal crises not to take such action so as to ensure the best uses of scarce and diminishing educational resources.

A TRUE COPY OF RESOLUTIONS ADOPTED BY
THE BOARD OF EDUCATION ON JUNE 7, 1995

SECRETARY, BOARD OF EDUCATION

THE STATE EDUCATION DEPARTMENT/THE
UNIVERSITY OF THE STATE OF NEW
YORK/ALBANY, N.Y. 12234

President of the University
and Commissioner of Education
The New York State Education Department
Albany, New York 12234

July 12, 1985

Dear Secretary Bennett:

The July 1 decision of the United State Supreme Court in *Aguilar v. Felton* has, as you well know, presented state and local education agencies throughout the Nation with an extraordinarily difficult and complex task.

The delivery by school districts in this State of special educational services to educationally deprived, low income children who attend nonpublic schools, in accordance with ECIA Chapter 1, has been accomplished almost exclusively, since the initiation of the program in 1965, through the presence of public school teachers in nonpublic school buildings. Entirely apart from the question of the educational adequacy of any other method of service delivery, the identification and implementation of alternatives would involve a process which cannot possibly be completed before the commencement of the 1985-86 school year. As of today, barely eight weeks remain before the opening of schools in September.

Apart from the logistical problems of acquiring and readying alternative instructional space, whether fixed or mobile, and of rearranging the assignments of both students and teachers, the typical school is faced with the fact that most staff are 10-month employees, and are not available during the months of July and August to design and construct alternative arrangements.

In sum, it would be utterly impossible for State education agencies and local education agencies to comply with their statutory responsibilities under ECIA Chapter 1, under the strictures imposed by the Supreme Court, by the opening of school in September, 1985, or indeed within several months thereafter.

And as you are well aware, State agencies may not approve the applications of local education agencies for Chapter 1 funds to be used in the public schools unless those applications include provisions for the delivery of services to students in nonpublic schools which comply with Chapter 1 and the implementing regulations. As a result, it is not only the best interests of eligible youngsters in nonpublic schools which are at stake, but indeed the interests of all educationally deprived, low income youngsters attending both-public and nonpublic schools.

It is therefore my urgent request that you, as a party to *Aguilar v. Felton*, and on behalf of all of the school districts in the Nation, request your attorney in that case to make application to the appropriate Court for a continued stay of the mandate of the District Court during the 1985-86 school year, in order to afford both local education agencies and State education agencies adequate time to develop and implement, in consultation with nonpublic school officials, orderly methods of delivery of Chapter 1 services to educa-

tionally disadvantaged, low income students who attend nonpublic schools.

I suggest that such a stay extend for the entire 1985-86 school year because I am convinced that a major change in the service delivery system will be more difficult to implement during the course of a given school year than at the commencement of a new year, but more importantly because I believe strongly that a substantial change in mid-year will not be in the best educational interests of the affected youngsters.

Needless to say, it will be most helpful if you will inform me and other chief state school officers of your decision as promptly as possible.

Sincerely,

Gordon M. Ambach

Hon. William J. Bennett
Secretary of Education
United States Department of Education
FOB 6, Room 4181
400 Maryland Avenue, S.W.
Washington, D.C. 20202

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

GUIDANCE
ON
AGUILAR v. FELTON
AND
CHAPTER 1 OF THE
EDUCATION CONSOLIDATION AND
IMPROVEMENT ACT (ECIA)
QUESTIONS AND ANSWERS

August 1985

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1. Question: May Chapter 1 instructional services be provided to private school students on the premises of religiously-affiliated private schools?

Answer: No. In *Aguilar v. Felton*, the Supreme Court held that Chapter 1 instructional services may not be provided on the premises of religiously affiliated private schools. Instructional services for those children must be provided at sites that are neither "physically nor educationally identified with the functions of the private school." See *Wolman v. Walter*, 433 U.S. 229, 246-47 (1977).

2. Question: Are Chapter 1 programs on nonreligious private school premises affected by the *Aguilar v. Felton* decision?

Answer: No.

3. Question: Does the term "teacher" as used in *Aguilar v. Felton* include other public school personnel?

Answer: The Second Circuit opinion affirmed by the Supreme Court in *Aguilar v. Felton* forbade "the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services." However, the Supreme Court in an earlier case, *Wolman v. Walter*, distinguished the role of the diagnostician from that of the teacher or counselor with regard to services in the private school. We view testing to select children as part of diagnosis; hence, on-premises testing for

student selection is not prohibited under *Aguilar*.

4. Question: If a local educational agency's (LEA) application does not provide for equitable services to private school children, may a State educational agency (SEA) approve it?

Answer: No. Furthermore, the LEA has no authority to expend funds until the SEA approves the application.

5. Question: How are services to private school children to be monitored by the LEA and SEA?

Answer: The LEA and the SEA must monitor services for private school students in the same way they monitor services to public school children. In addition, the SEA must ensure that equitable services are provided to private school students.

6. Question: Can private school students receive services in public schools or at neutral sites during regular school hours? Before or after school or on weekends?

Answer: Yes. These options are all available, but the services must be equitable to services provided public school children.

7. Question: Can private school children receive Chapter 1 services in the private school before or after regular school hours or on weekends?

Answer: No.

8. Question: Can private school children receive services with public school children in a summer school program?

Answer: Yes, but services must be equitable to those provided public school children. To provide only summer activity for private school children, while serving public school children during both the regular term and summer, would not be equitable.

9. Question: Where may summer school services be provided?

Answer: At any site allowable during the regular school year.

10. Question: Has the LEA and SEA responsibility for providing services on an equitable basis to eligible private school children been changed?

Answer: No, it was not changed by the Court's decision.

11. Question: Who is responsible for planning and implementing the Chapter 1 program for private school children?

Answer: An LEA must plan to provide Chapter 1 services to private school children "in consultation with private school officials." However, the decision as to what to propose in its application rests with the LEA and the decision as to what to approve rests with the SEA.

12. Question: What criteria should an LEA and SEA

consider to determine equitability?

Answer: First of all, the public and private school children must be considered as participating in the same project, not different projects--for which those children, all at certain grade levels, are selected on the basis of similar measures of educational need. The "equity" of services for private school children can be assessed only by comparing those services to those provided for public school children. The services may be considered equitable if--

- a. The LEA assesses, addresses, and evaluates the private school children's specific needs and their educational progress on the same basis as public school-children.
- b. The LEA provides, in the aggregate, about the same amount of instructional time and materials for each private school child as compared with each public school child.
- c. The instructional services cost about the same. Section 557(a) of Chapter 1 of ECIA requires "equal" expenditures for private and public school students. Thus, the cost per eligible child must be considered in determining equitability. However, cost is not the sole means of determining equitability.
- d. The private school child has an opportunity to participate equitable to the opportunity of a public school child. In one school district the opportunity may be at another site during the school day. In another, it may be outside of regular school hours. Any alternative must be evaluated in the light of local

conditions. Other factors should be considered, including the level of educational service, the age of the children to be served, the time lost in travel, availability of transportation, distance, weather, supervision, safety, and the opportunity for and the rate of participation.

13. Question: May an LEA revise its program for public school students so that it is equitable with that for private school students?

Answer: Yes. In some cases it may be necessary to adjust the manner in which services are provided to public school students.

14. Question: May Chapter 1 pay for the rental of facilities, the cost of arranging for such space, the costs of transporting private school pupils, or the costs of transporting private school pupils from home to the Chapter 1 services?

Answer: All of the above are allowable Chapter 1 costs.

15. Question: If providing off-premises services requires additional costs, such as those for transportation, space, or administration, do they come from the LEA's whole Chapter 1 allocation or from that part of the LEA'S Chapter 1 allocation which would normally go to serve private school students?

Answer: These additional costs would come from the LEA's whole allocation, so that Chapter 1 instructional services may be provided on an equitable basis to both public and private school

children.

16. Question: Where an LEA provides Chapter 1 services to nonpublic school children in the public schools, may the LEA charge Chapter 1 a reasonable amount for the space used? How are such costs allocated?

Answer: Yes. Reasonable and necessary costs for public school space for the instruction of nonpublic school students are allowable. Reasonable and necessary costs are those in excess of what the LEA would incur in the absence of Chapter 1. For example, the cost of a classroom in a building already in use would not be an excess cost. Special costs incurred in preparing and maintaining it for occupancy by Chapter 1 would be allowable.

Any such costs would be considered administrative and would come from the LEA's whole Chapter 1 allocation--not the portion which is for instructional services to private school children.

17. Question: May a private school child take onto private school premises Chapter 1 instructional materials for his or her use as part of the child's Chapter 1 program?

Answer: Yes.

18. Question: Can a neutral third-party contractor provide instructional services on the premises of a religiously-affiliated private school?

Answer: No.

19. Question: On what basis can a bypass be requested?

Answer: Section 557(b) of the Chapter 1 statute and Section 200.80 of the regulations state that if an LEA is prohibited by law from providing or the Secretary determines that the LEA has substantially failed to provide Chapter 1 services to private school children, he can waive the requirement of the LEA and, instead, arrange for the provision of such services. A representative of a private school child can register a complaint with the Department that an LEA has substantially failed to provide Chapter 1 services; an LEA or SEA can voluntarily notify the Department that the LEA is prohibited from or unable to provide such services; or the Department through its monitoring function can determine that an LEA failed to provide services.

20. Question: If private school officials consider the Chapter 1 program offered by the LEA to be inequitable, what can they do?

Answer: They may complain to the LEA. If no satisfactory action is taken, they may complain to the SEA. If still no satisfactory action is taken, they may complain to the Secretary. If appropriate, the Secretary takes the steps necessary to invoke a bypass.

21. Question: What are the steps leading to a Chapter 1 bypass?

Answer: After a complaint is received by the Secretary and an investigation finds that an LEA has substantially failed to provide services on an

equitable basis to private school children, the Secretary informs the LEA and SEA that a bypass will be invoked. The number of subsequent steps and amount of time necessary to provide services with a bypass varies according to the extent to which at LEA or SEA wishes to appeal. The specific steps are to be found in Section 557(b) of Chapter 1 and in Sections 200.80-85 of the regulations.

22. Question: Where do funds for a bypass come from?

Answer: Funds are deducted from the allocation of the LEA. In computing the amount to be deducted, administrative costs, for both the public and private school programs, are calculated and deducted from the allocation. Remaining funds are allocated for public and private school children to ensure that educational services are equitable. Any increased administrative costs attributable to the bypass, therefore, are shared by both the public and private school children. The Department will ensure that services are provided in the most cost effective manner.

23. Question: Did *Aguilar v. Felton* specifically forbid instructional services provided to children in neglected or delinquent institutions operated by religious groups?

Answer: No. The Court did not address the unique circumstances involved in serving children in neglected or delinquent institutions.

THE STATE EDUCATION DEPARTMENT/THE
UNIVERSITY OF THE STATE OF NEW
YORK/ALBANY, N.Y. 12234

July 22, 1985

TO: District Superintendents, Superintendents of
Schools, Nonpublic School Administrators
and School District Attorneys

PROM: Robert D. Stone

SUBJECT: ECIA Chapter 1 Services to students attending
nonpublic schools

On July 1, 1985, the United States Supreme Court ruled in two separate cases that public funds may not be used to pay public school teachers to provide instruction to students on the premises of sectarian nonpublic schools.

The decision of greater import for both public and nonpublic school authorities both in New York and throughout the Nation held that the administration of the Title I (now Chapter 1) program in New York City violates the Establishment Clause of the Federal Constitution because the supervision and monitoring of the work of publicly paid teachers in providing instruction to meet the needs of educationally deprived children from low-income families, and the necessary consultation and cooperation between public and nonpublic school officials, results in "excessive entanglement" between State and church (*Aguilar v. Felton*).

In a related case involving programs of the Grand

Rapids, Michigan school system, the Court found two locally funded programs invalid under the Establishment Clause (*School District of the City of Grand Rapids v. Ball*). One program was offered in nonpublic schools after the regular school day, and included a variety of courses which were clearly not religion-oriented. The program was voluntary, and the teachers were part-time, public school employees who for the most part, the Court found, were otherwise employed full-time by the same nonpublic school in which the community education classes were held.

The other program offered classes during the regular school day that were intended to supplement the "core curriculum" courses required by the State of Michigan.

The Supreme Court held that both programs had the primary effect of advancing religion, and were therefore unconstitutional. The majority of the Court said that the programs impermissibly promoted religion in three ways. First, the State-paid teachers involved in the programs might be influenced by the "pervasively sectarian" nature of the religious schools in which they work, and might subtly or overtly indoctrinate the students in particular religious tenets at public expense. Second, the "symbolic union of church and state" inherent in the provision of secular State provided public instruction in religious school buildings tends to convey a message of state support for religion to students and to the general public. Third, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

It is important to understand the bases for the holdings of the majority of the Supreme Court in both cases because the reasoning may well be relevant to alternative

methods which may be considered for delivering Chapter 1 services to students enrolled in nonpublic schools. Copies of the opinions in both cases are annexed as Attachments A and B.

The critical questions now faced by local school authorities and State education agencies throughout the Nation are what alternative methods of delivery of Chapter 1 services to eligible educationally disadvantaged children in sectarian nonpublic schools are now permissible and when such alternatives must be implemented.

With respect to timing, it is clear that the identification and implementation of alternatives in a responsible way will require more time than is available prior to the beginning of school in September of this year. For that reason, Commissioner Ambach has transmitted the attached letter to Secretary of Education William J. Bennett (Attachment C), urging him - as a party to *Aguilar v. Felton* - to make application to the appropriate Court, on behalf of all school districts in the Nation, for a stay of the effect of the Supreme Court decision for a period sufficient to afford local school authorities and State education agencies sufficient time, in consultation with nonpublic school authorities, to develop and implement effective methods of delivery of Chapter 1 services to students enrolled in nonpublic schools.

Because there is no assurance that such a stay will be granted, it is essential that local school authorities, State education agencies and the United States Department of Education, in consultation with nonpublic school authorities, proceed immediately to consider alternative methods of providing Chapter 1 services. Consultation with nonpublic schools is essential in the entire planning process. Local

school officials should discuss proposed programs as well as possible means and sites for delivery of services with nonpublic school officials as plans are developed.

Immediately upon learning of the Supreme Court decisions, this Department contacted officials of the Department of Education for information as to the position and plans of that agency. While no definitive advice has yet been provided to us, we are informed that a meeting of State directors of Chapter 1 services has been scheduled for August 1 in Washington, and that in the meantime the Department of Education invites questions concerning any aspect of the problem. All school authorities in New York are invited to submit any questions they may have, through the chief school officer (superintendent of schools or chief administrator of a nonpublic school) to Assistant Commissioner Maria Ramirez, Office for General Education, Education Building Addition, Albany, New York 12234.

With respect to the three-year unified compensatory education plan which school districts are required to submit to the State Education Department, each school district should do one of the following:

- Those school districts which have no eligible students enrolled in sectarian nonpublic schools should complete and submit to the State Education Department their three-year comprehensive compensatory education plans as soon as possible.
- Those school districts which are required to provide Chapter 1 services to eligible students enrolled in sectarian nonpublic schools and which have developed alternative means of doing so consistent with the recent Supreme Court decisions, should

complete and submit to the State Education Department their three-year comprehensive compensatory education plan as soon as possible. The plan must contain a clear and precise description of how and where services will be provided to eligible nonpublic school students and the specific costs involved.

•Those districts which are required to provide Chapter 1 services to eligible students enrolled in sectarian nonpublic schools but have not yet developed effective and legally permissible methods of doing so should submit to the State Education Department a three-year comprehensive compensatory education plan that is complete except for information pertaining to the delivery of Chapter 1 services to eligible students enrolled in sectarian nonpublic schools. Because school district plans for providing Chapter 1 services must specify how services will be delivered to both public and nonpublic school students, the State Education Department cannot give final approval to any Chapter 1 application unless it contains provision for the delivery of services, consistent with the recent U.S. Supreme Court rulings, to eligible students in nonpublic schools. Once districts have received guidance on acceptable programs, their Comprehensive Plans must be revised to include services to eligible nonpublic school students affected by the Supreme Court's decision.

Following the meeting of State directors of Chapter 1 services in Washington on August 1, and the issuance of more definitive information by the U.S. Department on the question of Chapter 1 services to nonpublic school students,

the State Education Department will provide additional guidance on possible alternative methods of delivering services to students enrolled in nonpublic schools.

In the meantime, it is possible now to address some questions of Federal and State law which relate to possible alternative methods of delivering service to students enrolled in nonpublic schools:

Neutral sites: The offering of classes at religiously neutral sites (i.e. locations not under the control of any religious authority or organization) seems clearly to be permissible.

Mobile units: The use of vans or other forms of portable facility appears to be legally unobjectionable, provided such units are not located on premises under the control of a sectarian nonpublic school or other religious organization.

Public School Premises: The use of public school buildings for the instruction of students enrolled in nonpublic schools presents a more difficult question. It has long been recognized that public school districts in New York are not authorized to admit to their classes students who are enrolled in nonpublic schools, except where there is express statutory authority, such as the "dual enrollment" authority provided by Education Law section 3602-c. The dual enrollment under that section is limited to programs in occupational and vocational education, special education and instruction for the gifted.

However, a careful review of the issue has led us to the conclusion that the requisite statutory authority in the

case of Chapter 1 programs can be found in Chapter 1 itself, and that school districts in New York State are authorized to provide, on public school premises, services under Chapter 1 for eligible educationally disadvantaged youngsters in sectarian nonpublic schools. It should be noted in this regard that the admission of youngsters enrolled in nonpublic schools to Chapter 1 classes in public school buildings should not be considered to be "dual enrollment," within the meaning of Education Law section 3602-c.

Instructional technology: The question whether the use of such techniques as interactive television or other instructional technology is legally permissible under the Supreme Court decisions will not be addressed in this memorandum. However, we shall pursue those possibilities in consultation with the United States Department of Education and Federal legal authorities, and will provide local school authorities with whatever guidance may result from those discussions.

Non-instructional expenses: The question whether and how such noninstructional costs as the purchase or rental of instructional sites, and the transportation of nonpublic students between their schools and such sites, can be defrayed with Chapter 1 funds is likewise a question we shall pursue with Federal authorities.

In addition to our close liaison with Federal authorities and with New York City school authorities and their legal advisors, Commissioner Ambach conducted a meeting on July 11 with representatives of both the public school and nonpublic school communities, and is designating a smaller working group representing those interests to assist

him in pursuing the various Chapter 1 issues. We shall of course keep all school districts and nonpublic schools advised as to the results of those efforts.

ALAN G. HEVESI
Comptroller

First Deputy Comptroller

Steve Newman

Director, Office of
Policy Management

Jeanne Millman

Office of Policy Management

Lincoln Stewart, author

Report Editor

David Neustadt

EXECUTIVE SUMMARY

New York City schools are severely overcrowded and the problem will probably get substantially worse over the next decade. In 1993, school enrollment was 1,015,758, the highest level in 15 years. The school system is adding the equivalent of an entire school district, more than 21,000 students, every year. This growth is expected to continue steadily into the next century, primarily due to immigration and the high number of births. By 2002, the Board of Education estimates that school enrollment will total 1,256,400, an increase of 240,642 from 1993.¹

¹1993 is the last year data is available. Throughout the report the ten year projection period 1993 to 2002 is used.

The City does not have the resources to build enough new schools to meet the need for new space and must actively pursue alternatives. Of the current student population, approximately 90,000 students, or 9%, lack regular classroom seats. The school system is currently projected to add only 18% - 57,375² - of the 321,900³ new seats needed as of 2002. We project that by that year overcrowding will more than double, and 21%, or 264,500 students will be crowded out of the classrooms. Furthermore, cuts to the capital budget will not only adversely affect the ability of the Board of Education to add new capacity but also its ability to perform critical maintenance work needed by some schools. This may result in a loss of current capacity.

The problem of overcrowding has spread rapidly around the City. Growth in enrollment is unevenly distributed. Schools in some districts are so overcrowded

²The current Five-Year Capital Plan for FY 95-99 provides for less than half, \$3.38 billion, of the initial budget requested by the Board of Education. This number incorporates additional cuts of 30%, already announced by the Office of Management and Budget, to the Board's current capital budget. Assuming a proportional impact on the budget, 12,045 new seats will be lost in this round of cuts.

³This number incorporates the existing and projected student overloads of the school system with no allowances for underutilization in other districts. It is greater than the projected increase in enrollment because of the overcrowding that already exists in the school system.

that classes have been held in bathrooms, hallways and closets, while others are underutilized and anticipate a continued decline in enrollment. In Queens, at PS 19 in District 24, many of the school's closets are being used as classrooms and at PS 89, in the same district, classes are taught in hallways and bathrooms. Overcrowding also varies with grade level. Most high schools operate at or above capacity and many are severely overcrowded. Overcrowding is also severe in elementary schools, although not to the same extent as in high schools.⁴ In middle schools the problem is less severe. Figures from the 1993-1994 school year show that:

- Queens is the most overcrowded borough, with 6 of its 7 districts over capacity. District 24 in Queens is the most overcrowded district, at 131% of capacity in its elementary schools and 122% of capacity in its middle schools. For example: PS 128 is at 169 % of capacity and IS 73 is at 136% of capacity.
- In District 6 in Manhattan, 21 of the 25 elementary school buildings are overcrowded. This represents a district-wide utilization of 114%. District 6 is unique in being the only overcrowded district in Manhattan at the elementary level. For example: PS 128 in District 6 is at 142% of capacity while PS 61 in District 1 is at 55 % of capacity.
- In District 31, in Staten Island, both the elementary and high schools are close to full capacity and

⁴Elementary and middle schools are organized by districts whereas high schools, under the direct supervision of the Board of Education, are divided by borough.

experienced significant growth in enrollment over the previous year with utilization currently at 96%.

- Severely overcrowded districts also include 10 and 11 in the Bronx, 17, 18 and 22 in Brooklyn and 27, 28, 29 and 30 in Queens.
- 13 of 32⁵ districts have overcrowded elementary schools. 415 of 744 elementary school buildings, 56%, are at 100% or more of capacity. 29,070 additional seats are needed citywide at present.
- Crowding is less of a problem in the middle schools. Only 5 of the 32 districts are overcrowded, with a shortage of 4,579 seats. 51 of the 184 school buildings, or 28%, are overcrowded. Many districts at this level have no overcrowded school buildings and the utilization is as low as 52% at IS 183 in District 7.
- At the high school level, all the boroughs, except Staten Island, are overcrowded, while the greatest problem is in the Bronx. 91 of the 111 high school buildings throughout the City, 82%, were at 100% or more of capacity in the 1993 school year. An additional 55,794 seats are needed.
- Immigrant students grew from 36,000, 4% of total enrollment, in 1989 to almost 160,000, 16% of enrollment, in 1993.

⁵District 33, under the jurisdiction of the Chancellor, is not a geographically defined district as are the other 32 districts. Currently, the only school within this district is IS 227 located in Queens.

The Board of Education projects that overcrowding will get substantially worse by 2002 with the largest increases projected to occur in Queens and the Bronx:⁶

- District 29, in Queens, is expected to be the most overcrowded district and Queens will have 7 of the 10 most overcrowded districts, Districts 29, 24, 27, 30, 25, 28, 26, in the City.
- In the Bronx, all but one district, District 7, are projected to be overcrowded with 4 districts, Districts 9, 10, 11, and 12 at more than 122 % utilization.
- District 31, in Staten Island, will be among the more severely overcrowded districts at the elementary level.
- All but 3 of the 32 districts will be overcrowded at the elementary school level.
- 20 of the 32 districts will have overcrowded middle schools.
- There will be a shortage of 135,600 seats at the high schools.

The Board of Education, in association with the overcrowded school districts, has developed a wide array of

⁶Projections vary, BOE projects enrollment growth of 240,642 between 1993 and 2002 while the Department of City Planning projects an increase of 126,000.

responses to overcrowding, including creative administrative solutions. However, increasing enrollment is overwhelming certain districts and the most overcrowded districts have already exhausted the traditional solutions to overcrowding, such as moving administrative offices and transferring grade levels from one school to the next. Other administrative solutions must be more fully investigated, for example, double shifting⁷, busing, leasing, and year-round multi-track education.⁸ The need to find alternate solutions to overcrowding becomes more pressing in view of the downward trend in capital funding for the school system. Alternatives will certainly cost money but these costs will be much smaller than traditional capital solutions, like building new schools, and are much more quickly implemented.

The experience of District 6, for many years the most overcrowded district in the City, the high schools and other overcrowded districts should be harnessed by the BOE and applied on a City-wide basis. New solutions will require adjustment on the part of students, teachers, parents, administrators, service providers and the community at large.

The Board of Education is currently reviewing recommendations made by its Redistricting Advisory Study

⁷Double shifting involves the division of the student population into two separate groups that attend school on two different schedules or shifts in a day.

⁸Year-round multi-track education involves the use of schools during the entire year. It does not, however, mean that students go to school all year. Students are organized into several groups or tracks that attend school on different schedules.

Group. The recommendations call for major changes to school districts in the Bronx and in Queens. While redistricting has great potential to improve overcrowding conditions, the changes, as proposed will have minimal impact on overcrowding. Restrictions stemming from geography and other local factors make it impossible to take advantage of redistricting's full potential.

Agency's Comments

The BOE basically agreed with our findings and recommendations. The BOE indicated that it has been pursuing many administrative solutions in addition to capital expansion which it says is not adequate for the existing or anticipated level of student overcrowding. We have incorporated their comments where appropriate.

Recommendations

- The BOE should implement a program to study and evaluate the efforts of District 6 and the high schools over the last decade and use the lessons of that experience to design Programs to alleviate overcrowding city-wide. District 6 has been innovative in busing students to other districts, establishing long-term mutually beneficial relationships with other districts as well as successfully implementing double shifting at the elementary and middle school level.
- The BOE should establish year-round multi-track education in the districts that are overcrowded, and are growing faster than capital or administrative solutions can be found. School capacity is increased with year-round schooling because the schools are

used by alternating groups or tracks of students the entire year. Schools on year-round education must be air-conditioned for summer use and should be identified immediately. Air conditioning may be done on a room by room basis, or where necessary, the entire school may have to be retrofitted. Although we recognize that some capital funds will have to be expended for projects already under construction, the limited capital funds for planned new construction can be better spent on air conditioning the schools to allow year-round education.

- The Mayor's Office of Labor Relations should begin immediately to negotiate to resolve any issues with the United Federation of Teachers, the Council of Supervisors and Administrators, other affected unions, and all other organizations that may be affected by the change to year-round education.
- Old schools should be modernized and new schools should be constructed to allow use by different grade levels. For example, new buildings should be designed with a layout that permits use by middle and high school students. The lines of distinction between elementary, middle and high schools are being blurred by the need to move grades between the different levels and to have a more flexible grade structure in response to changing patterns of overcrowding. The BOE has begun to experiment with new high school construction that allows middle and high school students use. However, modernized high schools and middle schools should be modified similarly.

- Where necessary, busing should be used to transfer students from overcrowded schools to schools with space within a district as well as schools in other districts. In severely overcrowded districts such as District 24, in Queens, where there is limited underutilized space, busing to another district within the borough should be considered. Magnet schools could be established with special programs to attract parents and students. Also, District 24 could establish annexes to its own schools in available buildings in surrounding districts.
- Double shifting should be considered as a solution for schools with severe overcrowding and in need of an immediate solution. PS 19 and PS 89 in District 24, at 133 % and 147% capacity respectively, are examples of such schools to be considered. Additional funds need to be provided for the incremental increases in the operating costs incurred when a school goes to double shifts.

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CHAPTER 1

ENROLLMENT IS GROWING RAPIDLY

The New York City public school system, the largest in the nation with 1,015,758 students and 1,053 schools in the 1993-1994 school year, has seen a rapid increase in enrollment since 1989, that is expected to continue at least until the turn of the century. Enrollment has grown more rapidly than the system's facilities, resulting in serious overcrowding in some areas that is likely to grow worse and eventually spread throughout the system.

The school system is divided into 32 school district's that administer the elementary and middle schools, see Figure 1.¹ The high schools and schools for students with special needs are administered by the central Board of Education. Overcrowding exists at every level in the school system. However, it is most severe in the elementary schools and high schools. The main cause of overcrowding is a sudden large increase in the number of students. In 1988, the Board of Education completely revised the school utilization formulae for elementary, middle, high schools and special education. This revision significantly cut class sizes and therefore reduced school capacities, increasing overcrowding.

Public school enrollment grew rapidly in the 1950s

¹District 33, under the jurisdiction of the Chancellor, is not a geographically defined district as are the other 32 district. Currently, the only school within this district is IS 227 in Queens which is below capacity. This report will focus on the 32 geographic districts.

and 1960s, and peaked in 1971 at about 1,150,000, as shown in Figure 2. Between 1971 and 1982, overall enrollment shrank by 228,076. However, due to the 1975 fiscal crisis and the City's inability to borrow, the City was unable to build new schools in the few areas that had growing student populations. Meanwhile, to cut costs, the City got rid of many school buildings and slashed the school budget. At the

New York City
Community School Districts



Figure 1

NYC Public School Enrollment

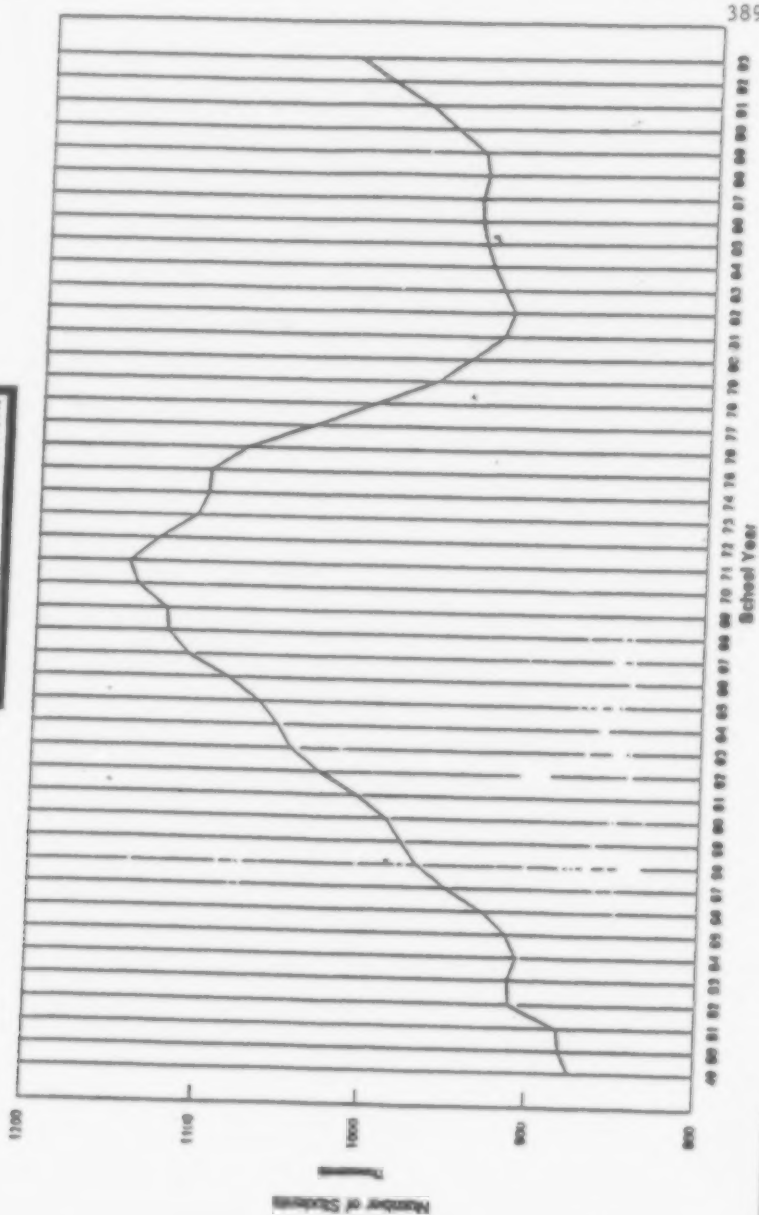


Figure 2

start of the last five-year Capital Plan in 1990, almost all school buildings needed some capital improvement. Thus, the City was ill-prepared when enrollment began to grow again in 1983, and really skyrocketed in 1989. City-wide enrollment has increased steadily from a low of 918,384 in 1982, to a 15-year high of 1,015,758 in 1993.

The New York City public school system grew by 21,263 students, the equivalent of an entire school district, in the 1993-1994 school year. This growth is expected to continue into the future and is exacerbating already severe overcrowding in many school districts. The Department of City planning, whose projections are usually more conservative than those of BOE'S, estimates City-wide enrollment for elementary and middle schools will increase from 689,109 in 1992 to 755,400 in 1997, a rise of 9.6%, and to 796,100 in 2002, a rise of 15.5%. The Board of Education's projections are for an increase of 10.8% to 763,670 in 1997 and a rise of 26.4% to 870,813 in 2002. For high schools, the Department of City Planning projects a 12.9% increase in enrollment from 283,810 in 1992 to 320,300 in 1997 and an increase of 21.5 % to 345,000 in 2002. The Board of Education's projections for high schools are for a 16.6% increase to 335, for 1997 and a 35.9% increase to 385,600 for 2002.²

Immigration

Increased immigration is the major cause of the recent rapid increase in enrollment. During the 1980's, an

²The Grier Partnership, Final Report- Enrollment Projections 1993 to 2002: New York City Public Schools, February 1994, Appendix B and C.

average of 86,000 new immigrants came to New York-City every year, as shown in Figure 3.³ The latest data available show that in 1992, 113,246 individuals (these are legal immigrants which include refugees) immigrated to New York City. These numbers are expected to continue increasing.

Immigrants coming to the City are younger than the general population, on average 26 years old compared to 33 years, and therefore have higher birth rates. Also, most immigrants send their children to the public schools. As of March 1991, more than 90% of the approximately 100,000 foreign-born students in the City were in public schools.⁴ Figure 4 shows the increasing percentage of immigrants making up the school population.

Immigrants frequently congregate with others from the same country, so the increase in immigration has affected some school districts much more than others. The report by the City Planning Commission: The Newest New Yorkers: An Analysis of Immigration Into New York City During the 1980s, reveals the following:

- A large number of immigrants has produced some of the severest overcrowding in District 6 in Manhattan. The immigrant community is moving northward and eastward, contributing to the severe overcrowding in District 10 in the Bronx as well as pocket overcrowding in District 9, also in the Bronx.

³Department of City Planning, The Newest New Yorkers: An Analysis of Immigration Into New York City During the 1980's, June 1992. p.1

⁴Op. Cit. p.165

- District 17 in Brooklyn, which serves Flatbush and Crown Heights, has been strained by large immigration.

- Immigration in District 24 in Queens, which includes Corona and Elmhurst, has contributed heavily to overcrowding. Elmhurst is one of the most diverse immigrant areas in the City.

Immigrants Admitted To New York City

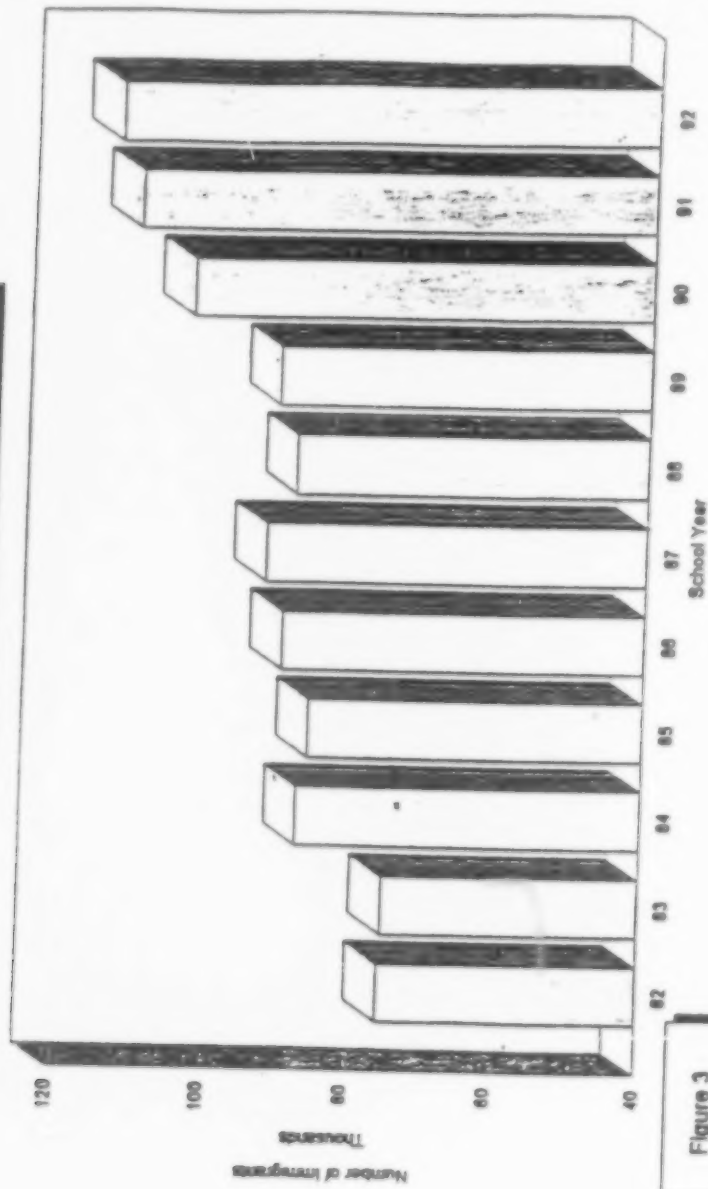


Figure 3

Percentage of Immigrant Students in NYC Public Schools

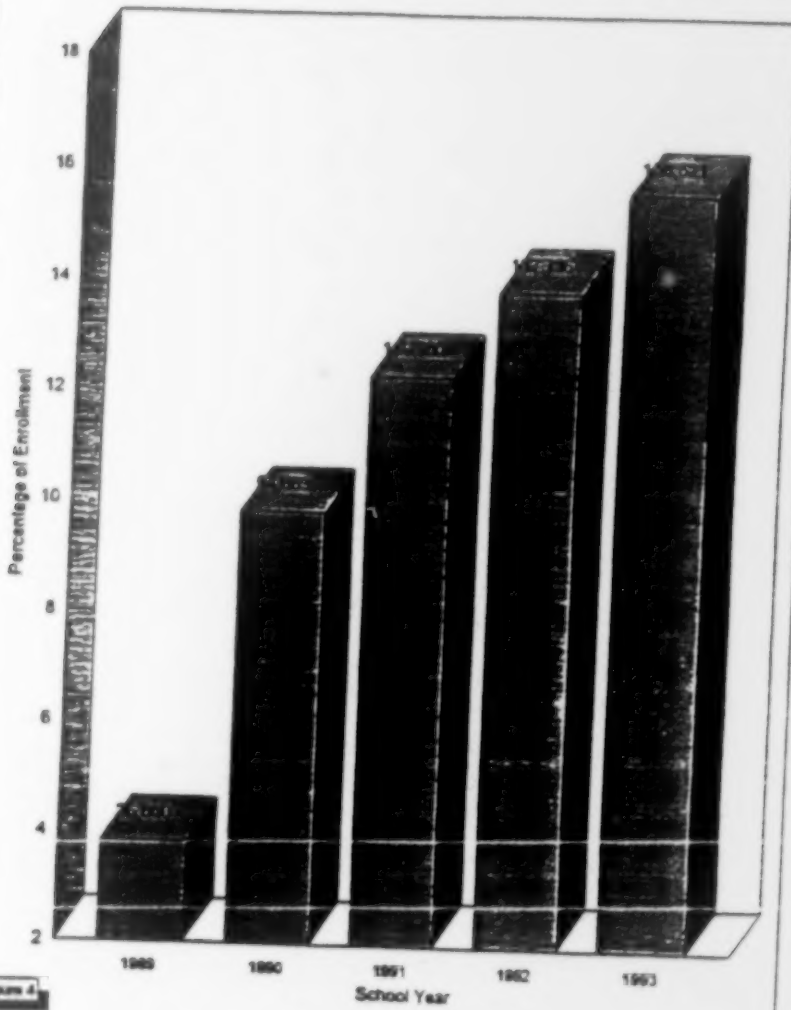


Figure 4

- District 30 in Queens, which includes Astoria, has been heavily impacted by immigration.

The wave of immigration is expected to continue as immigrants attract their families and relatives left behind in their countries of origin. Also, political instability in many parts of the world - Haiti, Eastern Europe, Russia, Africa, Southeast Asia - feeds the flow of immigrants.

High Number of Births

Births in the overcrowded districts are consistently higher than those in underutilized districts, as shown in Table 1.⁵ The highest number of births occurs in District 10, with severe overcrowding, and is more than five times the number of births in District 26, with much underutilization. The number of births in New York City increased every year during the period 1981 to 1990. The high births result from the presence of a large number of women in the peak child-bearing age, between 20 and 29 years of age. The trend in the high number of births is expected to continue through the year 2000. However, the annual increases in births that occurred between 1981 and 1990 appear to be leveling off.

Special Education

Increases in Special Education have also had a significant impact on overcrowding. Special Education requires smaller classes, usually a maximum of 15 students in a class.

⁵Department of City Planning.

TABLE 1

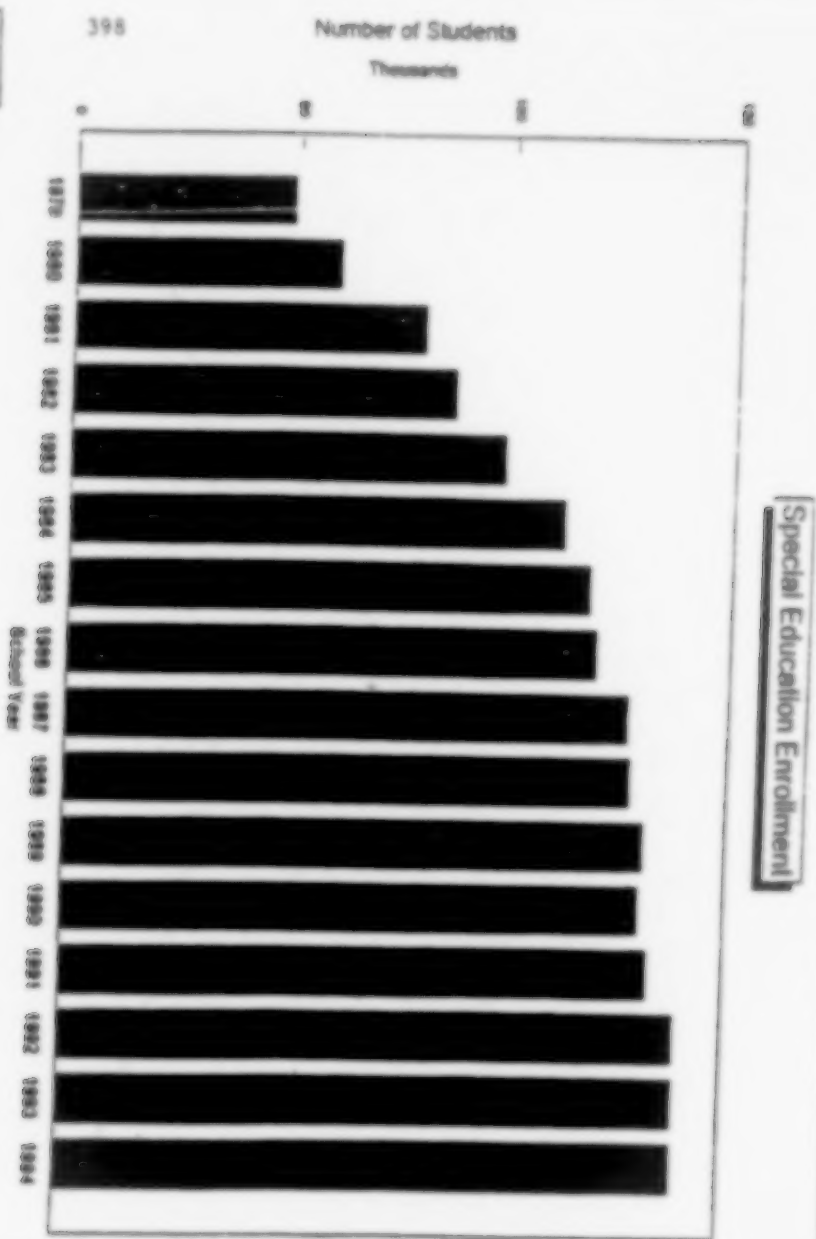
NEW YORK CITY BIRTHS BY SCHOOL DISTRICT 1961-1962						
SCHOOL DISTRICT	1961	1962	1963	1964	1965	1966
1	1406	1491	1342	1500	1455	1439
2	6210	6567	6335	6513	6340	6271
3	3163	3273	3485	3431	3467	3429
4	1492	1604	2090	1827	1836	1816
5	2417	2595	2557	2812	2811	2780
6	5708	5666	5834	6011	5813	5749
7	2197	2236	2363	2391	2431	2404
8	3115	3258	3359	3524	3531	3492
9	5206	5497	5615	5653	5735	5672
10	6595	6724	6725	7007	7155	7077
11	3632	3962	4185	4292	4280	4233
12	2773	2944	2875	3083	2962	2930
13	3109	3312	3051	3281	3174	3139
14	3693	3785	3821	3903	3750	3709
15	3825	3909	3989	4133	4208	4162
16	1743	1845	1921	1890	1795	1775
17	5927	5915	5951	5852	5745	5682
18	2595	2736	2673	2780	2781	2751
19	3909	3795	3833	4124	4008	3964
20	5034	5140	5328	5534	5572	5511
21	3739	3877	3992	4129	3994	3950
22	5191	5399	5407	5549	5476	5416
23	1891	1969	2075	2052	2016	1994
24	2546	2646	2765	2905	2873	2844
25	5242	5578	5858	6121	6206	6138
26	3215	3269	3335	3509	3443	3405
27	1228	1259	1182	1348	1334	1319
28	4286	4478	4547	4831	4810	4757
29	5624	5697	4059	3938	3910	3867
30	3607	3885	3782	4060	3940	3917
31	4589	4623	4857	5117	5363	5304
32	5565	6045	5981	6391	6369	6299

Source: New York City Department of City Planning.

In 1975, Congress enacted legislation mandating educational equality for the handicapped. The Special Education program has mushroomed from approximately 48,827 students in 1979 to 139,660 in 1994 - more than a 286% increase, as shown in Figure 5. This is due to a broadened application of the definition of disability to include a range of emotional problems and learning disabilities.

Special education results in a lower density use of existing classrooms. Most classrooms are designed for a capacity of 37 students but are normally filled with 30 students. However, special education classes are much smaller, usually ranging from 6 to 12 students. Therefore, the smaller special education classes are frequently held in rooms designed for more students. BOE has begun to subdivide large rooms into smaller classes for special education classes.

Figure 5



THE NATURE OF OVERCROWDING

Present Overcrowding

The degree of overcrowding in the public schools varies greatly. The most overcrowded building in the school system, the special education program at PS 58 in Manhattan, is at 252% of capacity, while the PS 23 annex in District 10 in the Bronx is only at 21% of capacity. For elementary and middle schools, District 6 in Manhattan traditionally has been the most overcrowded district.⁶ However, District 24 in Queens now has that dubious distinction. The elementary and junior high school enrollments in District 24 are 131% and 122%, respectively, significantly higher than any other district. In fact, the borough of Queens is the most overcrowded borough in the City. Other severely overcrowded districts are 10 in the Bronx, 17, 18 and 22 in Brooklyn and 27, 28, 29 and 30 in Queens. At the high school level all the boroughs are overcrowded, except Staten Island, but the problem is greatest in the Bronx. The problem of overcrowding is best studied by looking at the three different school levels separately.

Elementary Schools

Table 2 shows that thirteen of the City's 32 school districts are overcrowded in the elementary schools by a total of 29,070 students. Numbers from the 1993-1994 capacity utilization report indicate that 56% or 415, of the 744 school buildings were at 100% or more of capacity.

⁶Office of the Comptroller, Out of Space: An Analysis of Our School, September 1986, p.5.

TABLE 2
ELEMENTARY SCHOOL UTILIZATION

School District	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Buildings with enrollment equal or greater than 100%
MANHATTAN					
1	14	10242	7440	73	0
2	26	18804	16397	86	13
3	10	13180	10905	83	5
4	16	13352	11134	83	3
5	14	12834	11472	91	6
6	20	15402	13787	90	23
BROOKLYN					
7	17	14225	11414	80	2
8	24	16414	14626	90	10
9	33	22194	22804	98	14
10	40	23140	24040	104	25
11	20	15402	17201	112	18
12	19	14074	14722	105	3
BROOKLYN					
13	19	14155	13577	96	5
14	20	16246	13991	86	7
15	24	16846	16787	99	10
16	14	12446	9054	73	1
17	27	17715	18274	103	18
18	17	16901	22321	132	14
19	24	19295	19475	101	13
20	22	17642	18754	106	9
21	23	16798	13341	91	8
22	24	18442	20842	113	20
23	14	11242	9454	84	3
24	19	11528	10844	94	5
QUEENS					
25	27	19850	19447	98	27
26	20	15525	14675	95	13
27	21	16844	16145	96	7
28	32	20840	24224	116	27
29	27	15440	18029	117	25
30	23	15854	19754	125	22
31	24	17344	18177	105	20
STATEN ISLAND					
32	44	23451	24444	104	30

Source: Board of Education, 1991-1992 Enrollment, Capacity, Utilization, Percentage (1991).

New York City Public Schools
1993 Elementary School Utilization
by District

401

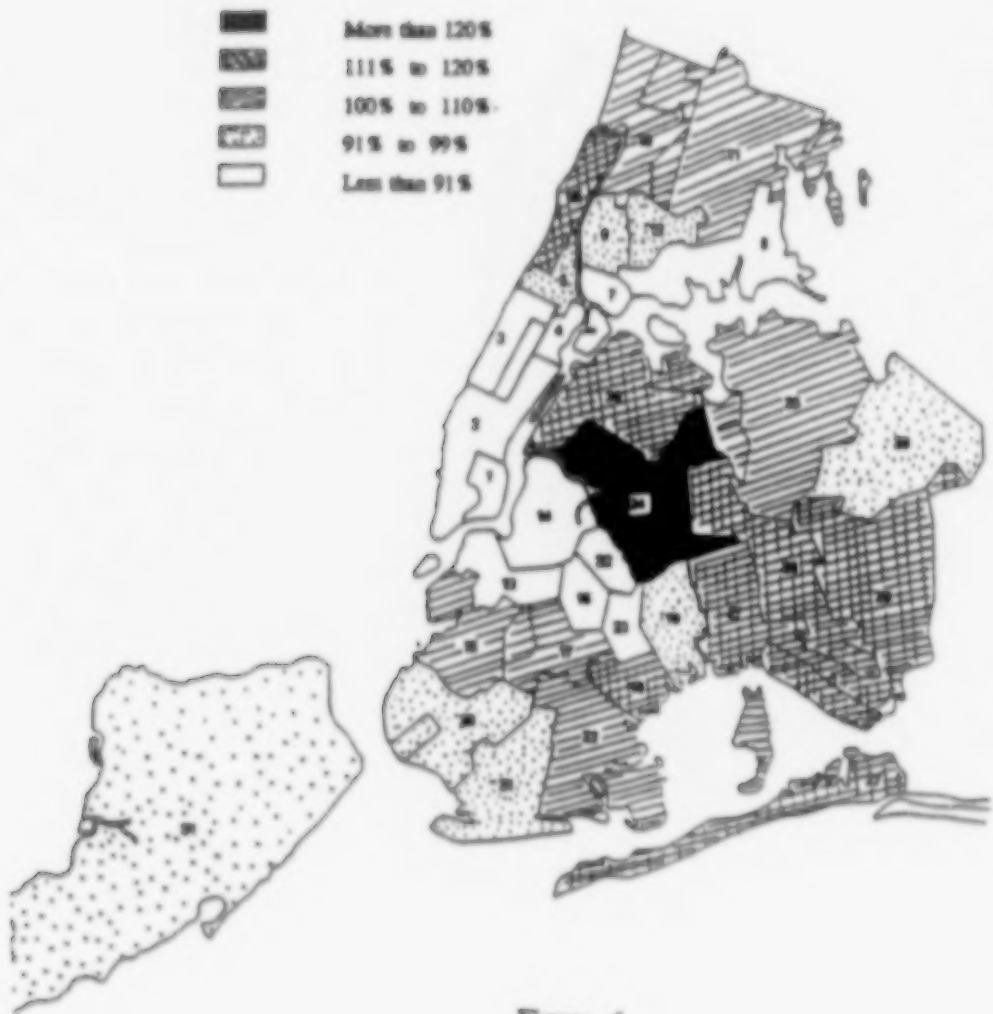


Figure 6

Table 2 also shows that for District 6, in Manhattan, 21 of the 25 elementary school buildings are overcrowded. This represents a district-wide utilization of 114%. District 6 is unique in being the only overcrowded district in Manhattan at the elementary level. On the other extreme, six of the seven districts in Queens are overutilized, with District 24, at 131% utilization, being the most severe City-wide. Every one of the 27 elementary school buildings in the district are overcrowded. In Staten Island's District 31, 20 of its 44 elementary school buildings are overcrowded and borough-wide utilization is 96%. Two of the Bronx's six districts are overcrowded while four of Brooklyn's 12 districts are overcrowded. Four districts: 9 (Bronx), 19 and 20 (Brooklyn), and 31 (Staten Island) are close to capacity at 95% or more. See Figure 6.

Middle Schools

The problem of overcrowding is much less severe in the middle schools than at other levels. Five of the City's 32 districts are overcrowded by a total of 4,579 seats. Twenty eight percent, or 51 of the 184 school buildings are at 100% or more of capacity.

Table 3 shows that District 24 in Queens is the most overcrowded middle school district in the City. All 8 buildings in District 24 are overcrowded, representing a district-wide utilization of 122%. Because of a large increase in enrollment, District 30 is now the second most overcrowded district at this level in Queens, however, Districts 29 and 27 are close to capacity, at 97% and 96% utilization respectively. Queens is the only borough

TABLE 3
MIDDLE SCHOOL UTILIZATION

403

School District	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Schools with enrollment equal or greater than 100%
MANHATTAN					
1	4	5521	3480	63	0
2	5	6525	4994	77	0
3	4	4953	4021	81	2
4	4	4770	3551	74	0
5	3	4477	2941	66	0
6	6	6776	7343	108	5
BRONX					
7	6	7560	4719	62	0
8	10	11285	7886	70	1
9	7	9648	8561	89	1
10	10	9133	10252	112	6
11	7	9013	8429	94	2
12	5	7184	4968	69	0
BROOKLYN					
13	4	4910	2793	57	0
14	6	7554	5304	70	0
15	5	6189	4697	76	2
16	2	2815	1815	64	0
17	7	9659	8455	88	1
18	5	5703	5633	99	2
19	6	6242	4490	72	0
20	6	7806	8704	112	5
21	6	8579	6883	80	0
22	5	6973	6771	97	2
23	4	5139	3287	64	0
24	5	7098	6294	89	1

Source: Board of Education, 1993-1994 Enrollment, Capacity, Utilization, November 1994.

TABLE 3 continued
MIDDLE SCHOOL UTILIZATION

School District	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Schools with enrollment equal or greater than 100%
QUEENS					
24	5	7814	6611	85	0
25	6	9976	5323	92	2
26	5	8592	8269	96	3
27	5	6858	6445	94	3
28	5	7366	7169	97	1
29	6	6111	6387	105	3
STATEN ISLAND					
31	21	14413	11207	78	1

Source: Board of Education, 1993-1994 Enrollment, Capacity, Utilization, November 1994.

with two overcrowded districts at this level. In Staten Island, the middle schools are underutilized, operating at 78% of capacity, with only one school building at or above capacity. See Figure 7.

High Schools

The problem of overcrowding in the high schools is consistently severe in all boroughs except Staten Island. Eighty-two percent, or 91, of the 111 high school buildings City-wide were at 100% or more of capacity during the 1993-1994 school year (See Table 4). An additional 55,794 seats are needed to satisfy the overcrowding at this level. In

406 New York City Public Schools
1993 Middle School Utilization
by District



Figure 7

addition to the primary causes of overcrowding at the elementary and middle school levels (immigration and high births) other factors contribute to overcrowding at the high school level. The practice of moving the ninth grade from middle schools to high schools has significantly added to the overcrowding. Another factor affecting overcrowding is modernization. As schools are brought up to modern standards, space is usually lost. For example, many modernizations involve additions of science and computer labs thereby reducing the space available for classrooms. Improvement in the drop-out rate has also contributed to high school overcrowding.⁷ Between 1989-90 and 1991-92, the latest year for which data is available, the drop-out rate declined from 6.6% to 4.8%⁸ Related to the improved drop-out rate is that many high school students take longer than the traditional 4 years to move through the system.

Table 4 shows that overcrowding is most severe in the Bronx where the utilization rate is at 135%. Sixteen, or 89 %, of the 18 schools in the Bronx are overcrowded. In Brooklyn where utilization is at 133%, 33 of the 35 schools, or 94% are overcrowded. As with the elementary and middle schools, Staten Island high schools are underutilized with a 96% utilization rate. However, 39%, or 3 of the eight high schools in Staten Island are overcrowded. See Figure 8.

⁷New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.72

⁸New York City Board of Education, Division of High Schools.

TABLE 4

ACADEMIC AND VOCATIONAL HIGH SCHOOL UTILIZATION*

Borough	Number of occupied buildings	Capacity	Enrollment	Utilization Percentage	Schools with enrollment equal or greater than 100%
Manhattan	25	60,410	64,781	111	17
Bronx	218	33,815	33,000	95	78
Brooklyn	53	67,733	83,009	123	33
Queens	227	48,013	43,607	91	22
S. Island	8	14,602	13,945	96	3

* Data has not been officially released by BOE as of January 1995.

Source: Board of Education, December 1994.

New York City Public Schools
1993 High School Utilization
by District

409



Figure 8

FUTURE OVERCROWDING

Based on demographic analysis, planned housing and school capacity additions, BOE makes 5-year and 10-year enrollment projections. With 1992 as a base year, current projections are for the years 1997 and 2002. See Appendices 2-7.⁹

BOE estimates that 24 school districts at the elementary level and 8 school districts at the middle school level will be overcrowded by the year 1997. By 2002, all but three of the 32 school districts will be overcrowded at the elementary level, and 20 of the school districts overcrowded at the middle school level. The overload¹⁰ for the year 2002 is projected to be 116,900 for elementary and middle schools. The largest increases are projected to occur in Queens and the Bronx. Five of the 7 districts in Queens are expected to grow by more than 10,000 students each by 2002. In the Bronx, 3 districts are projected to grow by 10,000 students and 1 district by 9,000.

Total high school overload is projected to be 135,600 by 2002. By 1997, and continuing to 2002, the borough of

⁹Appendices 2 through 7 were reproduced from BOE's 2003 Master Plan and shows 1997 and 2001 overcrowding levels. Although the data presented in these maps provide a clear graphical representation of the nature of the problem.

¹⁰Overload is used here as a measure of the seats needed to satisfy the overcrowding. It is the projected enrollment in the districts that are overcrowded less the capacity in those same districts. Reflecting the actual utilization patterns in the school system, it does not incorporate available capacity in underutilized districts.

Queens will be experiencing the most overcrowding at the high school level. Staten Island, currently the only borough with available high school space will be overcrowded by 1997.

CHAPTER 2

RESPONSES TO OVERCROWDING

Capital Construction

For many years after the fiscal crisis of 1975, the City had no access to the credit markets and therefore City-funded construction was virtually eliminated. In FY 79, the Board of Education's (BOE) capital expenditure was only \$53.7 million. As the City regained access to the credit markets, this expenditure, grew steadily to a level that averaged \$137 million annually for the years FY 84 - FY 88, see Figure 9. With an increased capital budget, BOE began to build new schools and add capacity to existing schools in the overcrowded districts. BOE's response was still inadequate to meet demand and school construction progressed very slowly. Many design and construction projects experienced serious delays.¹¹ BOE's efforts were hampered by the Wicks Law, which adversely affected the efficient management of the school construction process.¹² Delays were also caused by the site selection process and other predesign activities. Combined, these delays resulted in schools taking as long as nine years to complete.¹³

¹¹Office of the Comptroller, Design and Construction of Schools in Overutilized School Districts, November, 1987, p.2

¹²By New York State Wicks Law, municipal construction contracts over \$50,000 must be bid in at least four separate contracts, electrical, plumbing, heating ventilation and cooling (HVAC) and construction.

¹³Office of the Comptroller, Design and Construction of Schools in Overutilized School Districts, November 18, 1987, p.2.

NYC Board of Education - Capital Expenditures

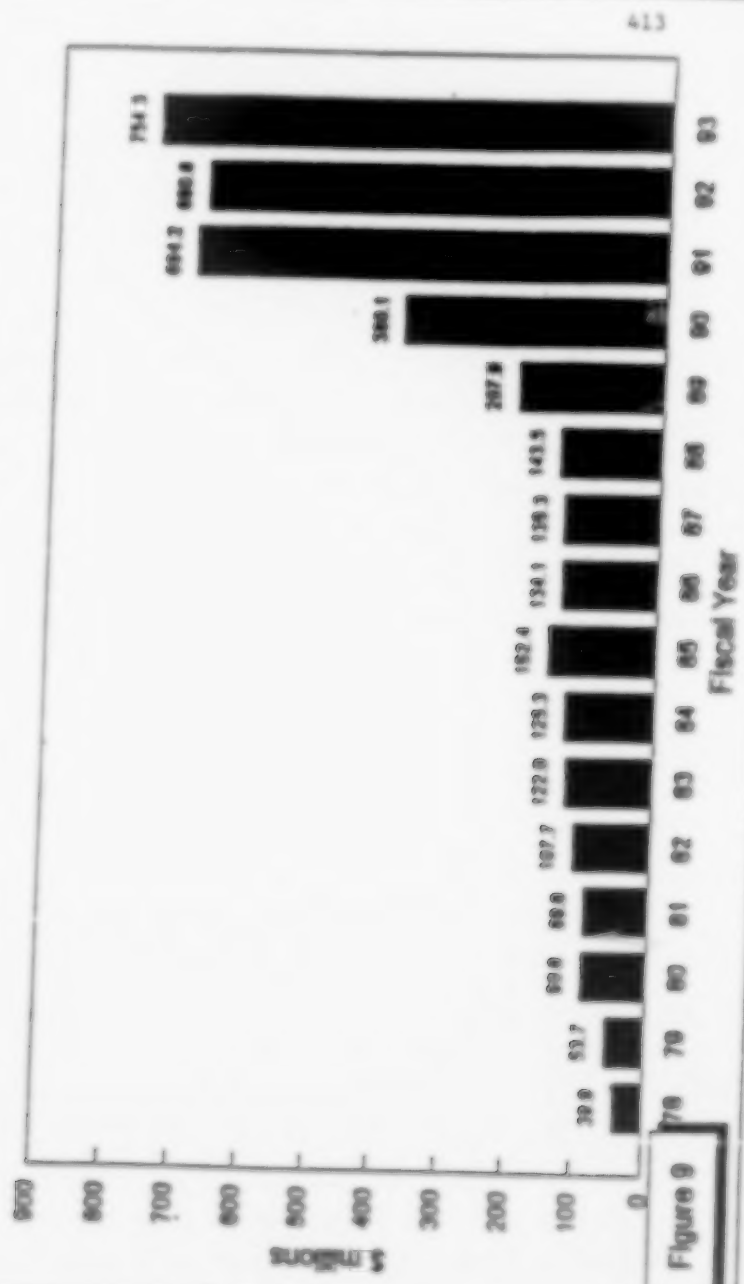


Figure 9

The School Construction Authority (SCA) was formed in December 1988 to streamline the City's school construction process. The State legislation creating the SCA exempted it from provisions of any general or local law, City charter, administrative code, or ordinance governing site selection, land use and City Planning Commission review, historic preservation or architectural review.¹⁴ The SCA was also exempted from the Wicks Law for five years, and granted the BOE one-time rather than annual approval of its five-year Capital Plan. Since 1988, SCA has completed 8 mini schools, 12 new schools, 12 projects involving building additions and 18 school modernizations, providing 18,140 additional seats. As of June 1994, 24 new schools, 18 projects involving building additions, and 29 modernizations are under construction, funded by the first five-year Capital Plan, which will provide an additional 29,269 seats.

Administrative Solutions

The central school board is responsible for implementing capital construction solutions to the overcrowding problem. The local school districts are responsible for administrative solutions. Some administrative solutions require the Board's involvement, for example, requests for leasing must be submitted to the Board by the local districts. There are also interdistrict solutions to overcrowding, such as busing, which require coordination between districts that can be facilitated by the central board.

Numerous space saving measures are employed to varying degrees throughout the school system to relieve

¹⁴City of New York, Executive Budget, FY 90, p. 254.

overcrowding. These measures include:¹⁵

- A. Transferring students to schools with available capacity by:
 - Establishing annexes in under-utilized school buildings
 - Busing
 - Rezoning the catchment areas for individual schools
 - Recapping, involving the transfer of 5th and 6th grade students from middle to elementary schools
 - Truncating, involving the transfer of 5th and 6th grade students from elementary to middle schools
 - Reassigning the flow of elementary school students to middle schools
 - Changing grade structure
- B. Reassigning classrooms dedicated to special programs to regular use
- C. Relocating non-instructional administrative programs that occupy classroom space
- D. Leasing space for relief of overcrowding
- E. Reassigning leased space to school organizations that are occupying classroom space and are willing to surrender their lease
- F. Shifting ninth grade middle school students to high schools

Building New Schools or Expanding Old Schools

The additional capacity needed to satisfy BOE projected overcrowding for 1997 of 172,000 seats (76,000

¹⁵Board of Education, District 24 Space Analysis, 1993, p. 14-16.

seats for elementary and junior high schools and 96,000 seats for high schools) dwarfs the amount of new space funded in the FY 95-99 Five-Year Capital Plan (28,105 seats in total).¹⁶ Capital funding for the SCA was cut by 55% from the Board's initial request of \$7.3 billion to \$3.3 billion. An additional cut of 30% in the capital budget has recently been announced by the Office of Management and Budget. Significant portions of the current Five-Year Capital Plan, particularly in the first two years, FY 95 and FY 96, are devoted to the completion of projects initiated under the previous Five-Year Capital Plan. Furthermore, emphasis is shifting from building new schools to maintaining and modernizing existing school buildings.

Leasing

The use of leased commercial space as a solution to overcrowding is growing dramatically, particularly in the less traditionally overcrowded districts. This is because leased space is less expensive and more quickly acquired than new buildings. Figure 10 shows the growth of newly executed leases since 1989. Only 7 new leases were executed in 1989. By June 1994, 11 new leases had been executed with a projected total of 22 executed leases for 1994.¹⁷ Of the leases executed between January 1989 and June 1994, size ranges from 1,700 square feet to 235,000 square feet. The cost of alterations also varies

¹⁶Board of Education, December 6, 1994, includes the estimated impact of the most recent 30% cut.

¹⁷The current five year capital plan allocates \$170 million for 15,000 new seats from leased space. Due to cut backs in the capital plan, funding to acquire and renovate new leases will be terminated after FY 1996.

New Leased School Facilities 1989 - 1994

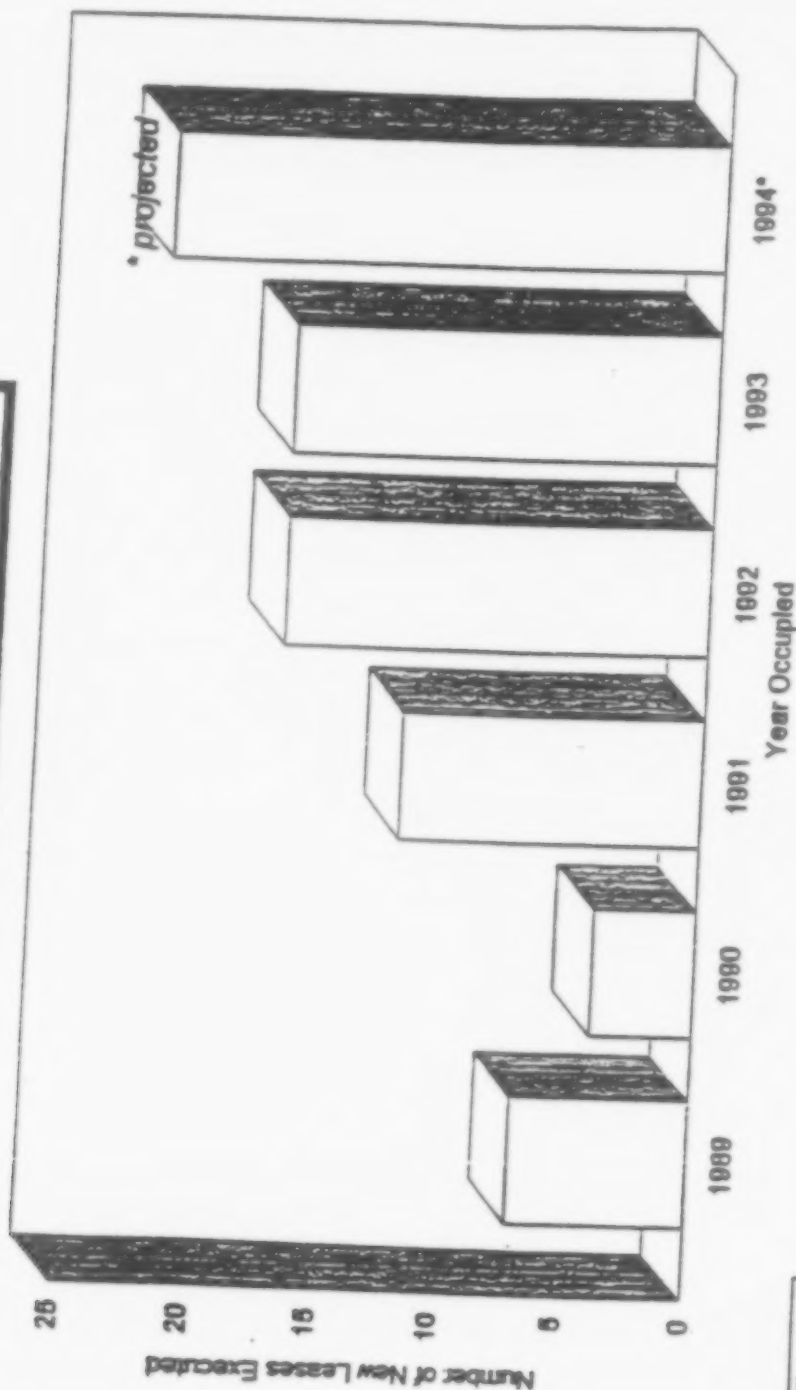


Figure 10

widely, ranging from no cost to \$23 million. Over 43% of the leased space, for elementary, middle and high schools, is used for administrative use, see Table 5. High school use accounts for 26.2% while 40% is used by elementary and middle schools, 26.2% for instructional purposes and 13.8% for noninstructional purposes. The majority of the school districts have only one leased facility that they use for instruction. Of the 26.2% of leased space used by the school districts for instructional use, most (20%) is by elementary schools. The remaining 6.2 % is used by middle schools.

TABLE 5
LEASED SCHOOL FACILITY USE

<u>Usage</u>	<u>Percent of Total</u>
Special Education: Classroom	4.6
Special Education: Administrative	12.3
Board of Education: Administrative	16.9
High Schools	26.2
School Districts	40.0
Instructional use	26.2
Non-instructional use	13.8

	100.0

Source: New York City Board of Education

Districts 25, 28, 29 (Queens) and 9 (Bronx) are examples of school districts actively pursuing new leases. District 6 has not applied for a new lease since 1992. BOE currently has 146 leases with private owners and is negotiating approximately another 120. Leasing is centrally administered by BOE. Individual districts must identify buildings they wish to lease and make a request to BOE. Sometimes commercial brokers are used to identify available

space. It usually takes 12 to 18 months from site identification to occupation.

In addition to directly relieving overcrowding, leases have been used to move administrative offices out of the school buildings and into commercial space so that all the available space originally designed for instructional use is so used. Most of the administrative offices in the most severely overcrowded districts are already housed in leased commercial space. Leases usually have a term of 15 years with a minimum duration of seven years in order to qualify for funds from the capital budget. Commercial space availability has been high and therefore lease rates have been relatively low. This trend is changing as the economy improves.

The BOE has leased space from parochial school systems, however the extent of this opportunity is limited. Jewish organizations generally have an overcrowding problem of their own due to increased immigration. The Catholic school system is reluctant to lease space to the public school system because of controversial issues such as the distribution of condoms to students.

The district with the highest rate of leasing is District 10 with 9.1 % of its students, or 3,247 in leased space followed by District 6, with 876 students, or 3.6%.

Busing

Few solutions to overcrowding have the potential for immediate large scale impact as do busing or transferring students to other schools or districts. Few students, however, are bused beyond their home school to relieve overcrowding. Of the over 696,000 students in the

elementary and middle school system during the 1993-94 school year, 5,604 were bused to an alternate school; 3,477 of which were bused within their district from 15 overcrowded school districts and 2,127 were, bused outside their district from 5 overcrowded school districts. Inter-district busing is mostly practiced in District 6 in Manhattan (see Figure 11), where 1,407 students, approximately 5.9%, of the elementary and middle school population

Busing to Relieve Overcrowding

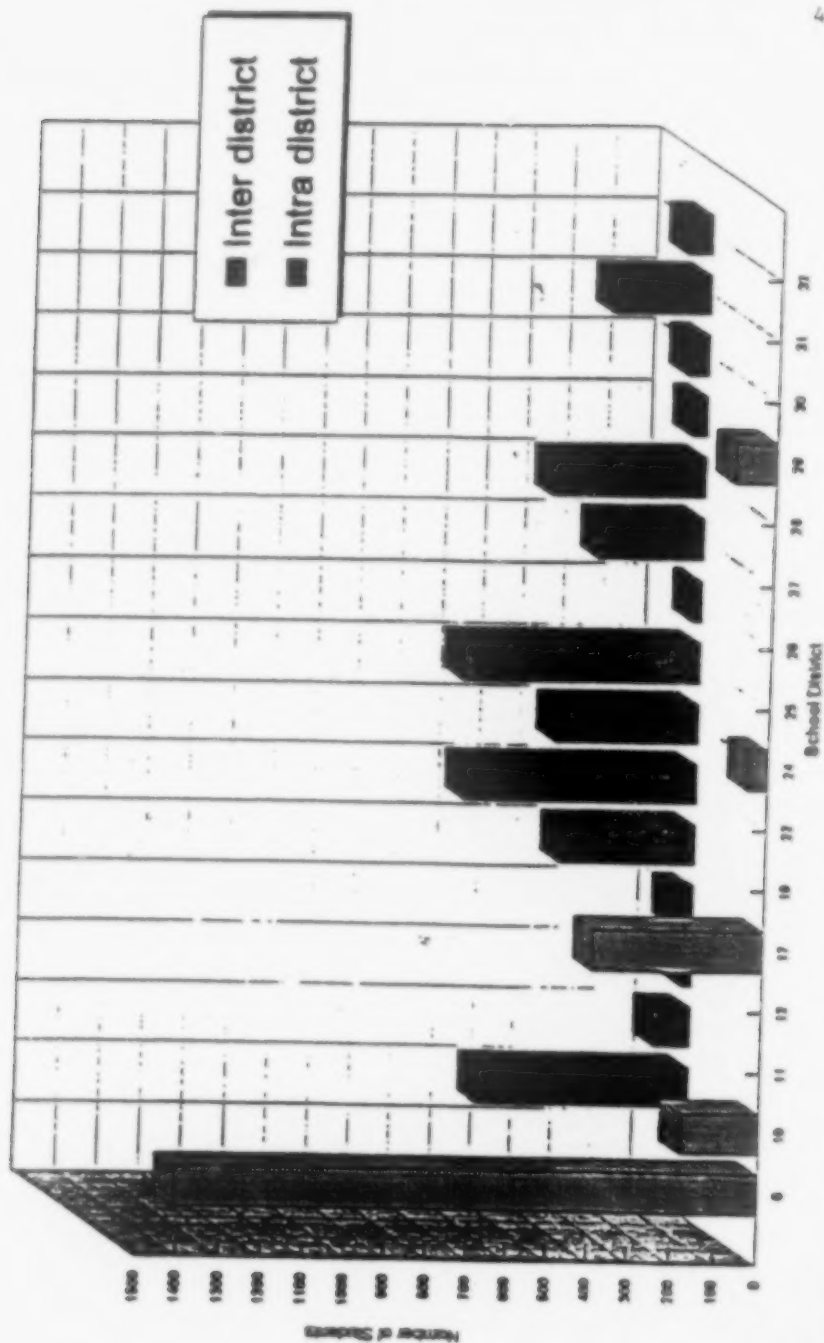


Figure 11

were housed in Districts 1, 3, 5, (Manhattan), 7 and 12 (Bronx).¹⁸ This represents 10.2% of the total enrollment of the source schools.

District 6 has been busing its students for over a decade. In the beginning of the busing program, the students that reported to their zoned school for registration after the school had reached capacity were bused to an adjacent school within the district. These students would stay at the receiving school for the rest of the school year. The following year the parent would have the option of allowing the child to remain at the receiving school or return to the zoned school. As District 6 ran out of space, it created annexes in nearby districts, initially PS 151 in District 7. In addition to annexes, District 6 has transferred some students to the registers of other districts. In this case the students are not on District 6's register while they are attending school in the other district. During the 1993-94 school year, District 6 had approximately 1,000 students on the registers of Districts 3 and 5 and 450 students in annexes in District 7. The level of busing in District 6 has declined as newly constructed buildings are occupied.

Inter-district busing has not been popular because of community resistance to moving students from one district to another. Parents must get their children prepared for school earlier than normal because of additional travel time to the new location. Families with two or more children do not want them in different schools at the same time. Parents are also hesitant to put their children on a bus to a remote location. Some districts are reluctant to receive out-of-district students. These objections have been overcome, at least in part, in District 6. Surprisingly, some students are

¹⁸District 6 Space Analysis, p.14, Fall 1992.

bused as far away as District 1 on the Lower East side of Manhattan. Approximately 130 students were bused to District 1 in school year 1993-1994.

In fact, many types of transfers out of District 6 occur. In addition to the 10-mile from District 6 to District 1, through Manhattan rush hour traffic, students also travel to District 7 and 12 in the Bronx. Some parents will make the extra effort to send their children as far away as District 1 in search of a better environment. Others will make the extra effort so that their children can receive a "normal schedule" and avoid double shifts. Some parents are able to work because their children are supervised for a much longer period than the normal school schedule at the zoned school would provide.

There is a financial incentive for the district that receives students from overcrowded districts. The receiving district gets more funds from the BOE in direct proportion to the number of students transferred. In addition, housing bused students keeps the receiving school more fully utilized so that custodial services are increased or maintained, which may not happen if the building is not fully utilized.

Busing within the borough is a workable strategy to relieve overcrowding in most districts. Throughout the City, almost all the overcrowded districts are adjacent to underutilized districts. For example, District 5 (Manhattan), located just south of District 6, has an elementary school underutilization of 728 seats and a middle school underutilization of 1,833 seats. Table 6 shows some of the most overcrowded districts and the adjacent underutilized districts.

The borough of Queens is an exception, with acute

overcrowding throughout the elementary and middle schools because of high immigration. District 24 is the most overcrowded in the City. Even with the planned construction of new schools and the pursuit of other administrative solutions to overcrowding for District 24, the problem is projected to get much worse. Capital solutions to overcrowding are not feasible because of the amount of additional capital and time required to build additional schools. Busing should be part of the mix of administrative solutions that are implemented in District 24.

As with District 6, inter-district busing could have a significant impact on overcrowding in District 24. If implemented to the same degree, 5.9% as in District 6, overcrowding could be reduced by over 1,680 seats. This would provide the equivalent space of two new schools costing \$50-70 million.

The most crowded schools in District 24 in Queens are concentrated in the northeastern portion of the district, Region 1, and in the central portion of the district, Region 3, (see map, Figure 12.) The students from Region 1, in the northeast, can be bused to middle schools in District 25 which are generally underutilized, and to elementary schools and middle schools in District 26. The underutilized schools in District 26 are clustered more in the center and eastern portion of the district. The students at the schools on the central portion, Region 3, of District 24 could also be bused to District 26. These bus rides would be long, however, as in District 6. The benefits of busing to another district may outweigh the disadvantages.



Board of Education, *District 24 Space Analysis*, 1993, p. 6.

Figure 12

Other Alternatives

Overcrowding is severe enough that BOE and the school districts have had to find creative solutions. Building new schools would be prohibitively expensive and slow in response to the immediate need. BOE has implemented several initiatives that help to alleviate overcrowding while reducing capital costs. Each program has its own incentives for parents. For example, the college collaborative program offers the convenience of location for college students with school-aged children. Some of these are outlined below:

Choice

With the Choice Program parents have the option of enrolling their children in a school within their district but out of their zone or in a school in another district. The "receiving" school, however, must be underutilized. Working parents benefit by having their children near their work location.

College Collaborative

Some colleges within the City University system house high school programs, for example, LaGuardia, Hostos and Bronx Community Colleges. BOE plans to expand this program. Additionally, BOE is opening Family Colleges to provide pre-Kindergarten through second grade classroom space on the campus for the children of college students.

Secondary Collaborative

To take advantage of underutilized middle school space, BOE has created new high schools using nontraditional grade structures, such as grades 6-12

or 7-12.

Headquarters Consolidation

Three buildings in the BOE headquarters complex are to be returned to school use. These buildings were originally designed for school use so the reconversion requires minimal capital expenditure.

Partitioning

Full-sized classrooms can be partitioned for use by smaller classes such as special education. Thirty seats can be gained for every full-sized room partitioned for special education.

TABLE 6
SOME OVERCROWDED DISTRICTS WITH
ADJACENT UNDERUTILIZED DISTRICTS

District	1993-1994			1994-1995		
	Capacity	Enrollment	Change	Capacity	Enrollment	Change
District 6	23862	23807	-55	23862	23807	-55
Adjacent District 5	12854	11672	-1184	4677	2841	-1836
District 10	22140	24348	+2208	22140	22332	+1992
Adjacent District 9	22104	23896	+1692	9648	8561	-1087
Adjacent District 12	14674	14722	+48	7184	4963	-2216
District 17	17723	18279	+556	8659	8493	-166
Adjacent District 13	14155	13877	-278	4910	2793	-2117
Adjacent District 16	12844	9624	-3220	2815	1815	-1000
District 18	10801	12021	+1220	2388	2603	+215
Adjacent District 19	19295	19473	+178	6242	4490	-1752
Adjacent District 23	11262	9696	-1566	5139	3287	-1852
District 24	13880	19667	+5787	8063	9803	+1740
Adjacent District 25	15525	14675	-850	7814	6611	-1203
District 28	13480	18029	+4549	6894	6405	-489
Adjacent District 26	10894	10143	-751	9976	5223	-4753
Adjacent District 25	15525	14675	-850	7814	6611	-1203
District 29	13884	17474	+3590	2366	7540	+5174
Adjacent District 26	10894	10143	-751	9976	5223	-4753
District 30	17346	18377	+1031	4131	4387	+256
Adjacent District 25	15525	14675	-850	7814	6611	-1203

Source: Board of Education, 1993-1994 Capacity, Enrollment, Utilization Book, November 1994.

PROMISING SOLUTIONS

Double Shifts

Double shifting involves the division of the student population into two separate groups that attend school on two different schedules or shifts in a day. One shift is scheduled for early classes and the other is scheduled for later classes. The two shifts can be arranged so that the second shift begins just as the first one ends, or it can be arranged so that both shifts overlap. These variations are known as split and overlapping shifts, respectively. Split shifts are preferable, but require a longer school day. Overlapping shifts are more complicated to handle, but require a shorter day than split shifts. When overlapping shifts are employed, the overlap or common periods are scheduled for programs such as gym classes, lunch or assembly.

Double shifting is not widely used in the New York school system at the elementary or middle school levels. It is used in many overcrowded high schools and in District 6 in Manhattan. Five schools in District 6 have been or are on double shifts: PS 115, PS 28, PS 128, IS 52, and IS 164. Double sessions have been effective in addressing severe overcrowding in particular schools in the district. For example, IS 52, in Washington Heights, has been at times one of the most overcrowded junior high schools in the school system. Administrators there used double sessions for 12 years, from 1982 to 1994. In February 1994, additional school space was made available that allowed IS 52 to move back to single sessions. Over the twelve years that double shifting was practiced, administrators at IS 52 worked out the kinks in implementing double sessions and have become quite knowledgeable on the issue. In 1991 when overcrowding was at its worst, IS 52 operated at

approximately 150% of capacity.¹⁹ Currently, there are 1,400 students at IS 52.

Each school year administrators at IS 52, which houses grades 5-8, estimate the degree of overcrowding through early registration. Classes are assigned on a first come first served basis. Late registrants are bused to another school or double shifting is initiated. IS 52 practiced school-wide double shifting, where the entire school is on double shifts. IS 52 experimented with split and overlapping shifts, in response to different conditions at the school. It finally adopted overlapping shifts. Figure 13 shows examples of overlapping shifts used by IS 52. The schedules are arranged so that students from both shifts are never in conflict for the same classroom or other space. Both shifts may come together for certain classes, e.g. Assembly. The younger students are put on the earlier shift while the older children are put on the later shift.

Some teachers were apprehensive before the program started, however, they understood the need for the changes and eventually were cooperative. At IS 52, teacher assignments were not a problem because the teachers were assigned to shifts based on grade level. Teachers with Common Branch licenses, that taught grades 5 and 6, were assigned to the early shift because these grades were on the early shift. Similarly, teachers with junior high school licenses, that taught grades 7 and 8, were assigned to the later shift. Shift assignment can be a problem and guidelines in the United Federation of Teachers (UFT)

¹⁹Delays in the construction of IS 218 and on going renovations at IS 52 reduced IS 52's effective capacity to 1,000 when enrollment was 1,500. Its normal capacity was 1,214.

OVERLAPPING SESSIONS USED BY DISTRICT 6

Twelve Session Schedule

	1	2	3	4	5	6	7	8	9	10	11	12
		7:15-8:00	8:45-9:30	9:30-10:15	10:15-11:00	11:00-11:45	11:45-12:30	12:30-1:15	1:15-2:00	2:00-2:45	2:45-3:30	3:30-4:15
EARLY SESSION •					Lunch	Lunch						
	LATE SESSION •						Lunch	Lunch				

Eleven Session Schedule

	1	2	3	4	5	6	7	8	9	10	11
		7:15-8:00	8:45-9:30	9:30-10:15	10:15-11:00	11:00-11:45	11:45-12:30	12:30-1:15	1:15-2:00	2:00-2:45	2:45-3:30
EARLY SESSION •				Assembly	Lunch	Lunch					
	LATE SESSION •			Assembly			Lunch	Lunch			

Figure 13

contract must be followed.²⁰ Teachers that were assigned to the early shift eventually grew to prefer it to a traditional schedule. Conversely, many teachers that were assigned to the later shift did not like it because it conflicted with extracurricular activities, such as, continued education, second jobs and religious observance. Also, double shifting disturbed some teachers' transportation schedules.

Although double shifts significantly increase the capacity of schools, student education may suffer in both quantity and quality. Students lose one instructional period per day and cultural classes such as music, art and dance are cut because it costs more to operate two shifts. These cuts can be curtailed by a modest increase in the school budget to provide additional teachers and cultural programs. This extra cost is preferable to the large outlay of capital funds required by new school construction.

Although parents and teachers initially resisted the implementation of double shifts, they eventually cooperated. Some problems had to be overcome, such as:

- The school day can sometimes start and/or end after dark. Changes in the degree of overlapping have been used to resolve this problem.
- Older siblings are sometimes unable to provide afterschool care for younger ones because they are in separate shifts. The school can arrange after school activities for those children in the first session until

²⁰The UFT contract covering the years 1991-1995, dictates that teachers are to be rotated and that assignment is to be based on seniority.

the second shift is over.²¹

- The truancy rate may increase. Students in the higher grades are sometimes reluctant to come to school earlier than they are accustomed. Truancy caused by double shifting can be minimized by scheduling the older students for the later shift.
- The quality of the school environment may be affected when resources are stretched to cover two sessions. For example, security personnel must cover more school hours - thereby reducing security levels. Longer hours also mean more wear and tear on the physical plant. Furniture, doors, books, desks, etc. deteriorate more quickly.

At the high school level where overcrowding is most severe, city-wide, double shifting is widely used. For example, Newtown High School in Elmhurst, Queens, operates at 212% of capacity. It is the second largest school in the system with 4,639 students and 229 teachers. Newtown has been on double shift since 1966. It initially used split shifts, but it converted to overlapping shifts in the early 1980s and is still using overlapping shifts today.

The first session starts at 7:28 AM and the last session ends at 3:14 PM. Sometimes students come to school in the dark. Six of the 11 sessions scheduled per day overlap. Some older students at Newtown prefer to attend the earlier shift because many students have part-time jobs

²¹Even though space to house after school activities is scarce, there is an improvement in space availability after double shifts are implemented because fewer students are accommodated in each shift.

in the afternoon. According to the principal, the major problem caused by double shifts at Newtown is decreased security. Because 6 of the 11 sessions overlap, students enter and exit the school buildings over an extended period during the day. This makes it difficult to ensure proper security at the school.

Each application of double shifting presents a unique opportunity to overcome a school's particular problems. It can be tailored to address the degree of overcrowding, the number of available rooms, grade level, etc.

Reacquiring Schools Given up in the 1970s

During the 1975 fiscal crisis, maintenance of school facilities was dramatically reduced, resulting in the deterioration of school buildings. Simultaneously, the school system was experiencing a gradual decline in enrollment. As a result, jurisdiction over 104 Board of Education buildings was transferred to other City agencies or approved for alternate uses. Many were sealed and remained vacant for many years and have deteriorated considerably. Some of the buildings were demolished. Over 58% of the buildings were built before 1910, with 28% built before 1900. A few of these buildings are recoverable. In some cases only the land is available as a potential site for a new school.

Only a few of the transferred buildings are located in the most overcrowded districts. Utilization in these districts has remained high over the years. However, there are some buildings that are located in districts adjacent to the overcrowded districts and may be of value in relieving overcrowding.

Year-Round School Calendar

The traditional nine-month school year evolved to accommodate growing and reaping seasons, permitting a three-month vacation during the summer to enable children to work on family farms.²² Beginning at the turn of the century, a number of communities developed a year-round school calendar. The early year-round school plans were successful. However, these programs began to fade because of societal disruptions such as the Great Depression and World War II. In the 1970s, year-round education was reintroduced as a means to improve education. By the 1980s, the emphasis changed, and most school districts implemented year-round education to ease overcrowding and to avoid the large capital costs of building new schools. The largest school district in the country currently using year-round education, the Los Angeles Unified School District, was forced to do so because of the failure of bond issue proposals and schools damaged by earthquakes.²³

Year-round education involves the use of schools during the entire year. It does not, however, mean that students go to school all year. Year-round calendars can be either single or multitrack. A single-track system has all students in school or on vacation at the same time. Single-tracks do not increase a school's capacity. A multi-track system divides the students into different tracks and each track goes to school and has vacation at different times during the year. Year-round multi-track education can increase building capacity from 25% to 50%. This system

²²Los Angeles Unified School District Priority Housing program, Historical Overview, Operational Data and Summary of the Research on Year-Round Education, p.2, April 1987.

²³Ibid, p. 3

has been implemented in numerous cities including Los Angeles, Dallas, Houston, Las Vegas and Denver.

There are different calendar options for year-round schools, depending on the degree of overcrowding. Some examples are given below.²⁴

- 90/30 Plan (Figure 14)

Divides school year into two 90-day terms, each separated by 30-day vacations.

Students and staff are off during 10-day winter vacation: two tracks attend school in July and August.

Requires 7 track rotations.

Can increase capacity by up to 33 %.

²⁴Los Angeles Unified School District Common Calendar Task Force, Common Calendar Recommendation: Final Report, 1988, p.8-9.

90/30

LOS ANGELES UNIFIED SCHOOL DISTRICT
DISTRITO ESCOLAR UNIFICADO DE LOS ANGELES

HOLIDAY
DIA DE FIESTA

YEAR-ROUND SCHOOL CALENDAR 1993-94

CALENDARIO ESCOLAR DE TODO EL AÑO 1993-94

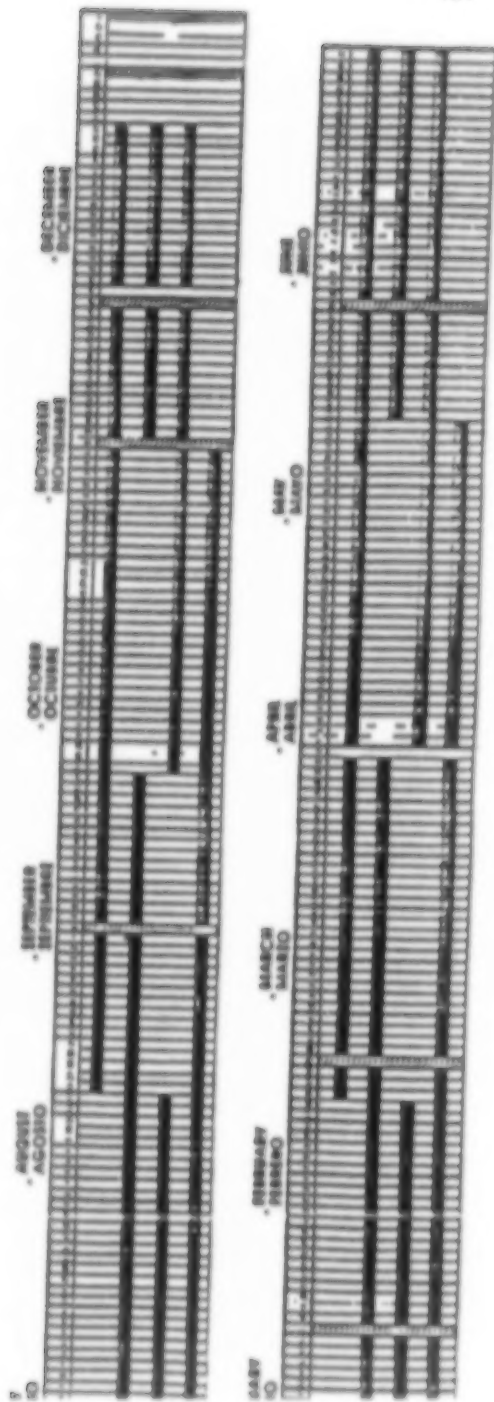


Figure 14

- 60/15 Plan

Divides school year into approximately three 60-day terms; each followed by a 15-day vacation.

Students and staff are off during a 10-day winter vacation and a 15-day summer break and three separate 15-day vacations.

Requires 14 track rotations.

Can increase capacity up to 25%.

- Concept 6 Plan (Figure 15)

Divides school year into six terms of approximately 41 days each; students attend four of the six terms, but two must be consecutive, resulting in instructional blocks of 82 days each; vacation blocks are 41 days long. Students and staff are off during 7-day winter vacation; two of the three tracks attend school in July and August.

Requires five track rotations.

Provides 163 days of instruction instead of 180 days provided by other calendars, thus requiring longer school days and legislative approval.

Can increase capacity by up to 50%.

- 45/15 Plan

Divides school year into four 45-day terms, each separated by a 15-day vacation. Students and staff are off during a 10-day winter vacation; all groups in the multitrack plan have vacation in the summer, but not at the same time.

Requires 15 track rotations and classroom chances for roving teachers of the various multi-track calendars.

Can increase capacity up to 33%.

Some calendar options for year-round education, such as Concept 6, don't allow enough instructional days during the school year to satisfy New York State requirements.²⁵ This can be overcome, as it was in Los Angeles, by changing state law to reduce the number of school days to 163, while still allowing the same amount of instructional time. The State of California redefined the school year by minutes instead of days and allowed the extension of the school day by forty minutes.

²⁵New York State law requires that students have 180 instructional days in the school year.

YEAR-ROUND SCHOOL CALENDAR 1993-94

CALENDARIO ESCOLAR DE TODO EL AÑO 1993-94

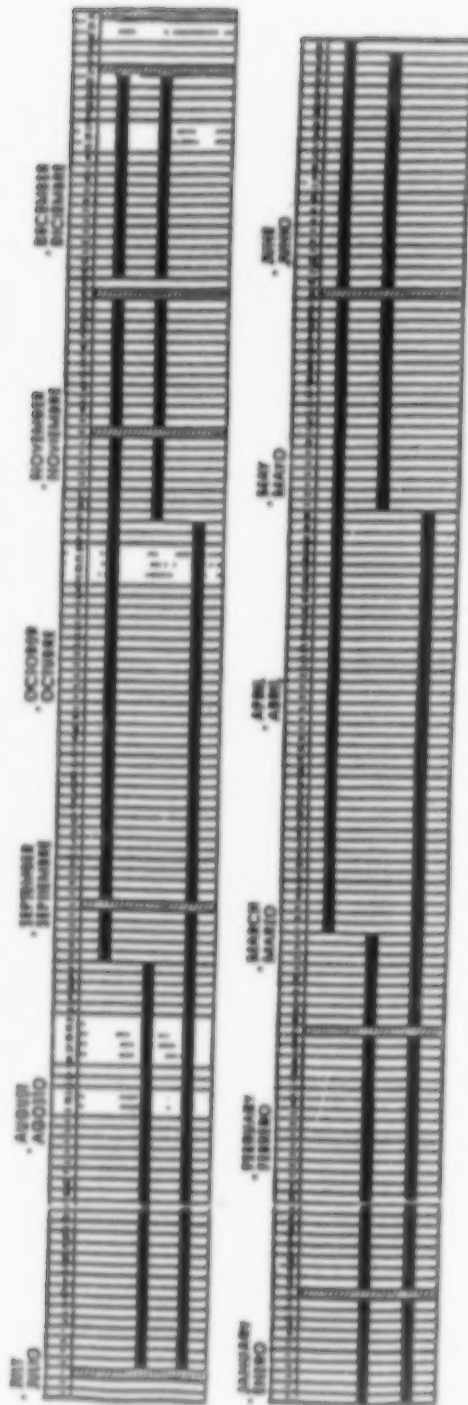


Figure 15

Advantages to Year-Round Education

The Los Angeles Unified School District reviewed studies of year-round education from school districts across the nation and concluded the following:²⁶

- Attitude: teachers, students, parents, administrators and communities preferred year-round education after participating in it, but those on a traditional schedule had negative perceptions about year-round education and were reluctant to change.
- Student Achievement: There were no significant differences in student achievement between year-round education and traditional programs. Less review was required after the shorter vacations in year-round education programs.
- Student Behavior: There was a decline in vandalism, juvenile delinquency, and other disciplinary problems in year-round schools.

The New York City public school system would be faced with many barriers to the implementation of year-round education, as was the Los Angeles school district when it started in 1974. The greatest barrier will be the reluctance to end the tradition of summers without school. One of the first objections that can be raised against year-round schooling in New York is the lack of air conditioning in New York City school buildings. Although air

²⁶Los Angeles Unified School District Priority Housing Program, Historical Overview, Operational Data and Summary of the Research on Year-Round Education, p. 22, April 1987.

conditioning is being installed in all new and modernized school buildings (most of this construction is taking place in overcrowded districts where the need is greatest), this still represents only a handful of schools. This problem could be overcome by air conditioning the schools on a room by room basis. Not all schools would need to be air conditioned, only those operating on a year-round calendar. This approach would be substantially less expensive than building new schools. In the City's FY 94-98 Capital plan, presented in February, 1994, \$390.2 Million was set aside for air conditioning retrofit, specifically to allow schools to be used for year-round education.²⁷ But after the cuts to the capital program only \$6.1 million is now earmarked for air conditioning retrofit.²⁸

Addressing Major Community Concerns

School districts that have implemented year-round education have discovered some of the most pressing community concerns which are outlined below.²⁹

- Extra-curricular activities: Year-round schools continue to provide sports and other extracurricular activities. Students on vacation when seasonal activities are taking place can still participate.

²⁷City of New York, Financial Plan, Fiscal Years 1994-1998, Vol I.

²⁸ Board of Education, Five-Year Capital Plan, Fiscal Years 1995-1999, November 16, 1994.

²⁹Board of Education, Five Year Capital Plan, Fiscal Years 1995-1999, November 16, 1994

- Siblings at different schools: When children from the same family attend different schools, every effort must be made to place them on the same or similar schedules.
- Child care/Family life: Parents need to know several months in advance before a school switches to year-round education. This time is needed to parents to make new child care arrangements and by providers to adjust to new demands. Families will have the opportunity to take vacations at other times besides summer.
- Camping and recreation: The school districts and the Board of Education must work with parks, recreational and cultural agencies to provide activities throughout the year.
- Youth Employment: When all the students are on vacation in the summer, part-time jobs are sometimes difficult to get. If vacations are more evenly distributed over the year, students should find jobs more easily.

AGENCY'S COMMENTS

The BOE basically agreed with our findings and recommendations. BOE indicated that it has been pursuing many administrative solutions in addition to capital expansion which it says is not adequate for the existing or anticipated level student overcrowding. We have incorporated their comments where appropriate. The full text of their response is found in the Appendix.

CONCLUSIONS AND RECOMMENDATIONS

BOE and the school districts that are faced with overcrowding have developed a wide array of solutions, ranging from the most expensive and permanent: building new schools, to creative administrative solutions, such as moving the 5th and 6th grades from overcrowded elementary schools to underutilized middle schools. While the solutions are commendable, increasing enrollments make these solutions insufficient.

The Board of Education is currently reviewing recommendations made by its Redistricting Advisory Study Group. The recommendations call for major changes to school districts in the Bronx and in Queens. While redistricting has great potential to improve overcrowding conditions, the changes, as proposed will have minimal impact on overcrowding. Restrictions stemming from geography and other local factors make it impossible to take advantage of redistricting's full potential.

The problem of overcrowding is getting worse in many of the most overcrowded districts, with limited relief from the last five years of capital and administrative solutions. It is driven by large waves of immigration and a higher number of births in the overcrowded districts. In fact, the school system is growing at the rate of one large school district, or over 21,000 students per year. In the BOE 10-year planning horizon, immigration rates and overcrowding levels are expected to keep increasing. Virtually all districts will experience enrollment growth.

Some districts will find it impossible to solve the current and projected overcrowding if changes are not made in the way the districts and the central board approach the

problem. The borough of Queens, and Districts 24 and 29 in particular will experience the highest levels of overcrowding. The operational budget as well as the capital budget is shrinking - in a time of dramatically increasing enrollments, therefore, the traditional perspective used to solving the problem in the past, i.e. building new schools, must change. Imaginative district-wide solutions must be found. Other school districts around the country have faced the problem that New York City now faces and have overcome it through innovative change.

These solutions will require adjustment on the part of students, teachers, parents, administrators, service providers and the community at large. Many lessons gained from the experience of District 6, the high schools and other overcrowded districts can be harnessed by the BOE and applied on a City-wide basis. Some of these recommendations are outlined below.

- BOE should implement a program to study and evaluate the efforts of District 6 and the high schools, over the last decade, so that the information can be used to design programs to alleviate the overcrowding city-wide. District 6 has been innovative in busing students to other districts as well as implementing successful double shifts at the elementary and middle school levels.
- The BOE should establish year-round multi-track education in the districts that are overcrowded and are growing faster than capital or administrative solutions can be found. School capacity is increased with year-round schooling because the schools are used by alternating groups or tracks of students the entire year. Schools on year-round education must

be air-conditioned for summer use and should be identified immediately. Air conditioning may be done on a room by room basis, or where necessary, the entire school may have to be retrofitted. Although we recognize that some capital funds will have to be expended for projects already under construction, the limited capital funds for planned new construction can be better spent on air conditioning the schools to allow year round education.

- The Mayor's Office of Labor Relations should begin immediately to negotiate to resolve any issues with the United Federation of Teachers, the Council of Supervisors and Administrators, other affected unions and all other organizations that may be affected by the change to year-round education.
- Old schools should be modernized and new schools should be constructed to allow use by different grade levels. For example, new buildings should be designed with a layout that permits use by middle and high school students. The lines of distinction between elementary, middle and high schools are being blurred by the need to move grades between the different levels and to have a more flexible grade structure in response to changing patterns of overcrowding. BOE has begun to experiment with new high school construction that allows middle and high school students use. However, modernized high schools and middle schools should be modified similarly.
- Where necessary, busing should be used to transfer students to schools within a district as well as schools

in other districts. In severely overcrowded districts such as District 24, in Queens, where there is limited underutilized space, busing to a distant district should be considered. Magnet schools could be established with special programs to attract parents and students. Also District 24 could establish annexes to its own schools in available buildings in surrounding districts.

- Double shifting should be considered as a solution for schools with severe overcrowding and in need of an immediate solution. PS 19 and PS 89 in District 24 at 133% and 147% capacity respectively are examples of such schools to be considered. Additional funds need to be provided for the incremental increases in the operating costs incurred when a school goes to double shifts.

APPENDIX 1

BOARD OF EDUCATION'S RESPONSE

BOARD OF EDUCATION OF THE CITY OF NEW YORK

December 16, 1994

The Honorable Alan G. Hevesi
Comptroller, City of New York
1 Centre Street
New York, NY 10007

Re: Office of Policy Management's
Draft Report: Overcrowding in
New York City Public Schools

Dear Comptroller Hevesi:

Enclosed are the Board of Education's comments on and responses to the above mentioned report.

I am pleased to note that your office's report on overcrowding in the New York City Public Schools supports the Board of Education's analysis of and efforts to alleviate the escalating problem with overcrowding within the school system. As you are aware, I have established the Citizens Commission on Planning for Enrollment Growth to study many of the issues addressed in your report. The Commission is expected to issue their recommendations in mid-January of 1995.

Many creative solutions are being studied and implemented to increase the school system's capacity level. In this climate of drastic budgetary reductions, we must redouble our efforts in seeking solutions to seemingly intractable problems. Solutions and aid must come from all sources, within and outside of the city. Your report will help to alert citizens and public officials to the needs of the school system.

In the final analysis, all of us must continue to work for the benefit of our students and provide them with the resources and means to become educated and productive residents.

Sincerely,

Ramon C. Cortines
Chancellor

RCC:mk
Enclosures

C:	Jeanne Millman	Barry Sullivan
	Donald McCabe	Robert Buxbaum
	Beverly Hall	James Coney
	Lynne Savage	John Ferrandino

BOARD OF EDUCATION OF THE CITY OF NEW YORK

Reference No. 1994-286

December 6, 1994

MEMORANDUM

TO: James R. Coney
Auditor General

FROM: Robert Buxbaum
Chief Executive for School Facilities

SUBJECT: Response to NY City Comptroller's Office of
Policy Management's Draft Report Entitled
"Overcrowding in New York City Public
Schools: Where to We Go From Here"

The Comptroller's Office report summarizes most of the problems the Board of Education presently faces in dealing with school overcrowding. In these times of severe fiscal constraints, the BOE is being challenged to be as creative as possible in remedying this situation. The 1995-99 Five Year Capital Plan earmarks 36% of funds for increasing capacity levels. However, the \$809 million required for either the present number of students or the anticipated influx of students in the coming years.

For its part the Division of School Facilities has focused its efforts on a number on a number of initiatives in conjunction

with other BOE divisions. These activities include:

Working with the School Construction Authority to speed up the opening of new schools currently under construction in overcrowded districts to reduce utilization rates; especially at the elementary school level. The 1995-99 Five Year Capital Plan commits \$644 million for construction of 18 new schools, 5 building additions and 2 school renovations providing 16,250 seats.

Expanding the number of lease acquisitions during Fiscal Year 1995 to support Vision or thematic programs for schools. In addition, new leases to move district offices from schools into offsite locations; thus freeing up space for additional classrooms, are presently being negotiated. However, due to cutbacks in the capital plan, funding will not be available after Fiscal Year 1996 to acquire and renovate additional new leases.

As part of the Five-Year Capital Plan, School Facilities is working with the School Construction Authority to acquire 180 portable classroom units which will provide 8,900 seats. These portable units will give the BOE the flexibility to shift classrooms to schools experiencing overcrowding, on an as needed basis in as little as a 6 month time frame. Although they are temporary in nature, and not fully integrated with the main school buildings, they provide a viable, short term alternative to more costly capital construction.

Spending \$16 million over the next 5 years to increase the partitioning of special education

classrooms to free-up additional space for standard classroom use.

The two recommendations regarding busing to underutilized districts and year-round schooling are important policy initiatives which could impact favorably on the Board's space needs. However, since these initiatives would have a wide ranging effect on how education services are delivered in this City, the Division defers to the Central Board for an official policy stance.

The auditors recommend that old schools should be modernized and new schools designed and constructed to allow for use by different grade levels. Our capital program calls for construction of new facilities in those districts and for school grades most in need of additional space.

In general, the interior modernizations currently under way are necessary to bring older, mostly elementary schools to a state of good repair. These modernizations are designed to upgrade mechanical and electrical systems and will not, in most cases, add substantially to increasing capacity levels. The new facility construction projects underway now will reduce some of the congestion in the overcrowded districts for certain grade levels.

The Board is experimenting with a "Secondary Collaborative" initiative which will incorporate high school grades into middle school facilities. This can be accomplished because many of the junior high school student programs and building requirements are close to high school building and student requirements. There are some questions of mixing certain lower grade levels with a high school population which school districts need to resolve. In

addition, middle school grades can and are being adjusted presently to incorporate lower and or higher grades as necessary to maximize existing space.

In general, the Division agrees with the report findings and many of the suggested proposals for remediation of the space crisis. In fact, many of the administrative steps which have been implemented by numerous community school districts to relieve overcrowding were the direct result of the specific recommendations contained in School Facilities' Annual District Space Analyses which is given to the school districts for their information and use.

Thank you for the opportunity to respond to this report.

RB: RM: pl

C: Mark David
Cheryl Francis
Joseph Nappi
John Fratangelo
Kathleen Gallo
Robert Meeker
File

BOARD OF EDUCATION OF THE CITY OF NEW YORK

MEMORANDUM

November 28, 1994

TO: JAMES R. CONEY

FROM: Beverly L. Hall

SUBJECT: Recommendations: New York City
Comptroller's Report on School
Overcrowding

The report suggests short and long range solutions to overcrowding in the New York City Public Schools that will have varying degrees of impact.

The Board of Education must strive for 100% utilization in the districts that are underutilized but there will be parental resistance to busing across district lines especially from districts with high student achievement to districts whose schools are not doing as well.

Regardless of fiscal concerns and time, plans must be made to develop and construct new schools in the

areas with greatest needs. The City should explore the feasibility of getting more corporations and developers to partially or completely build new schools in exchange for City approval of their projects and/or tax breaks.

Multi-track year-round schools should not be implemented without the support of the parents.

BLH:jf

BOARD OF EDUCATION OF THE CITY OF NEW YORK

MEMORANDUM

November 22, 1994

TO: James R. Coney

FROM: John J. Ferrandino
Supervising Superintendent
Division of High Schools

SUBJECT: New York City Comptroller's Draft Report
on School Overcrowding

As you requested, the Draft Report on School Overcrowding was reviewed by several staff members within the Division of High Schools. Their comments and recommendations are detailed by page below.

If you have any questions or need further information, please contact Sharon Rachelson at extension 3458.

Page	Comment/Recommendation
ES 2	The solution to build new schools is

not being implemented because of the cut in capital funds. The footnote refers to a downturn in enrollment. High School enrollment has increased over the last several years and the Division of School Facilities has projected this trend to continue for several years.

ES 3

Year round education requires that buildings be air conditioned, union contracts be renegotiated and it will also result in more students being out on the streets. Summer School would also be impacted.

ES 4

When new high schools are constructed, the designs permit the use of space by middle and high school students.

5

The Five Year Capital Plan was cut 3.4 billion dollars. They refer to overbuilding during high enrollment periods and then eliminating school buildings in times of underutilization. This was never the case with high schools.

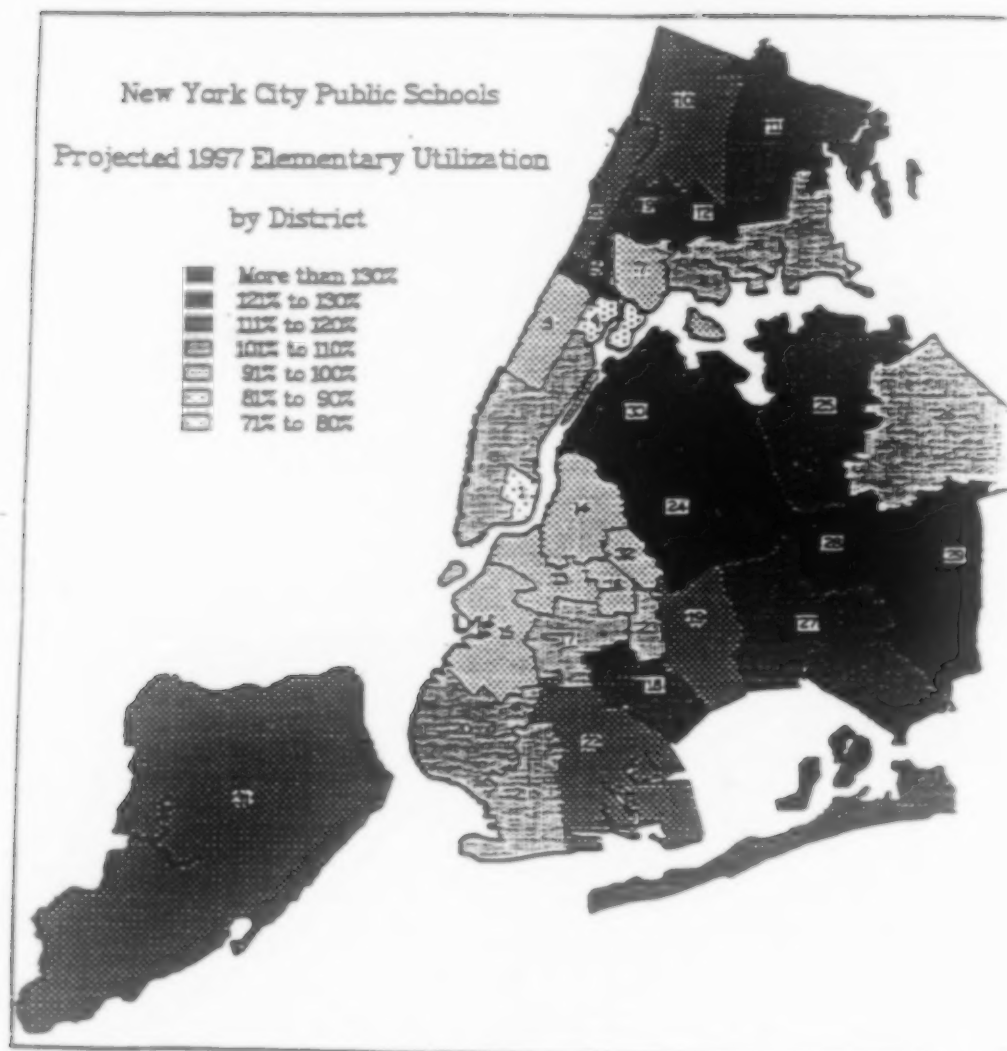
8

No estimates given for high schools.

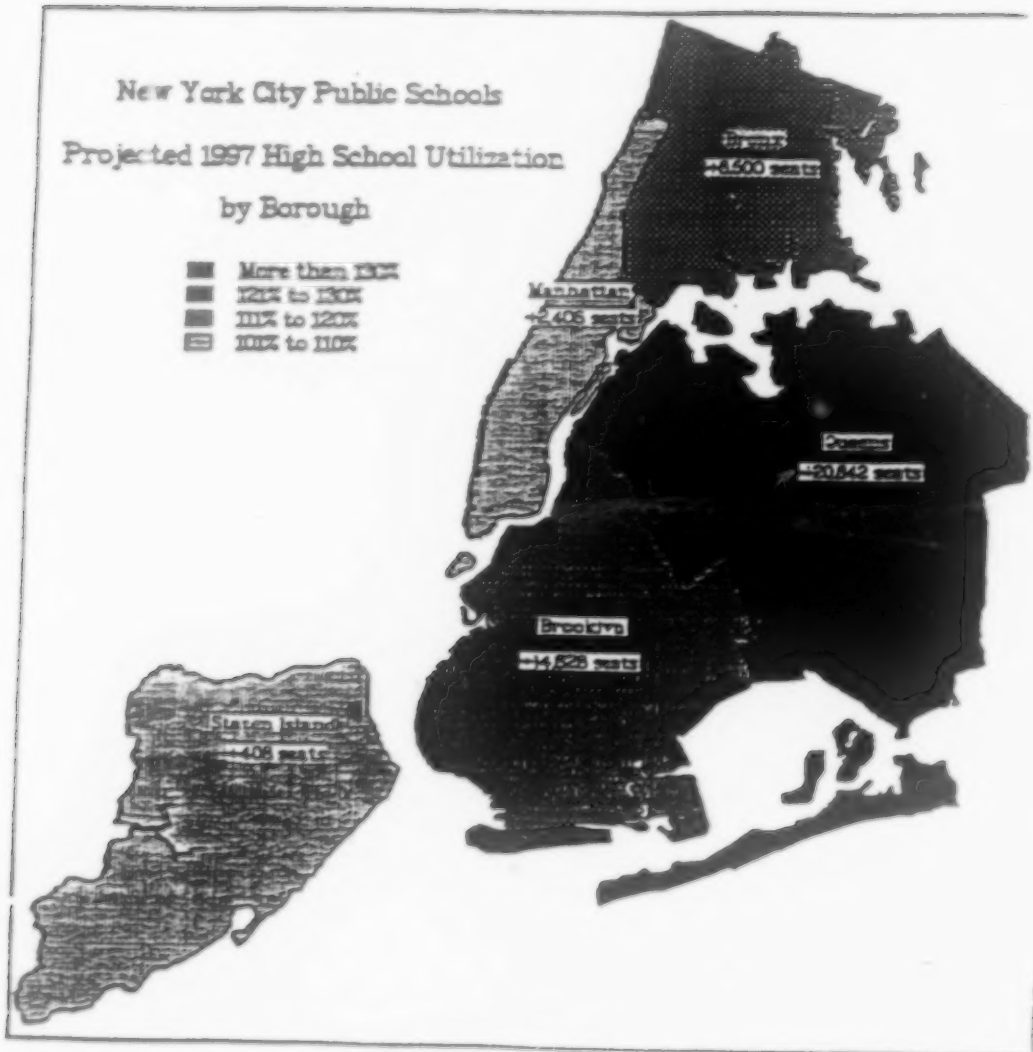
18

High school figures are not accurate. Why are they using 92-93 school year?

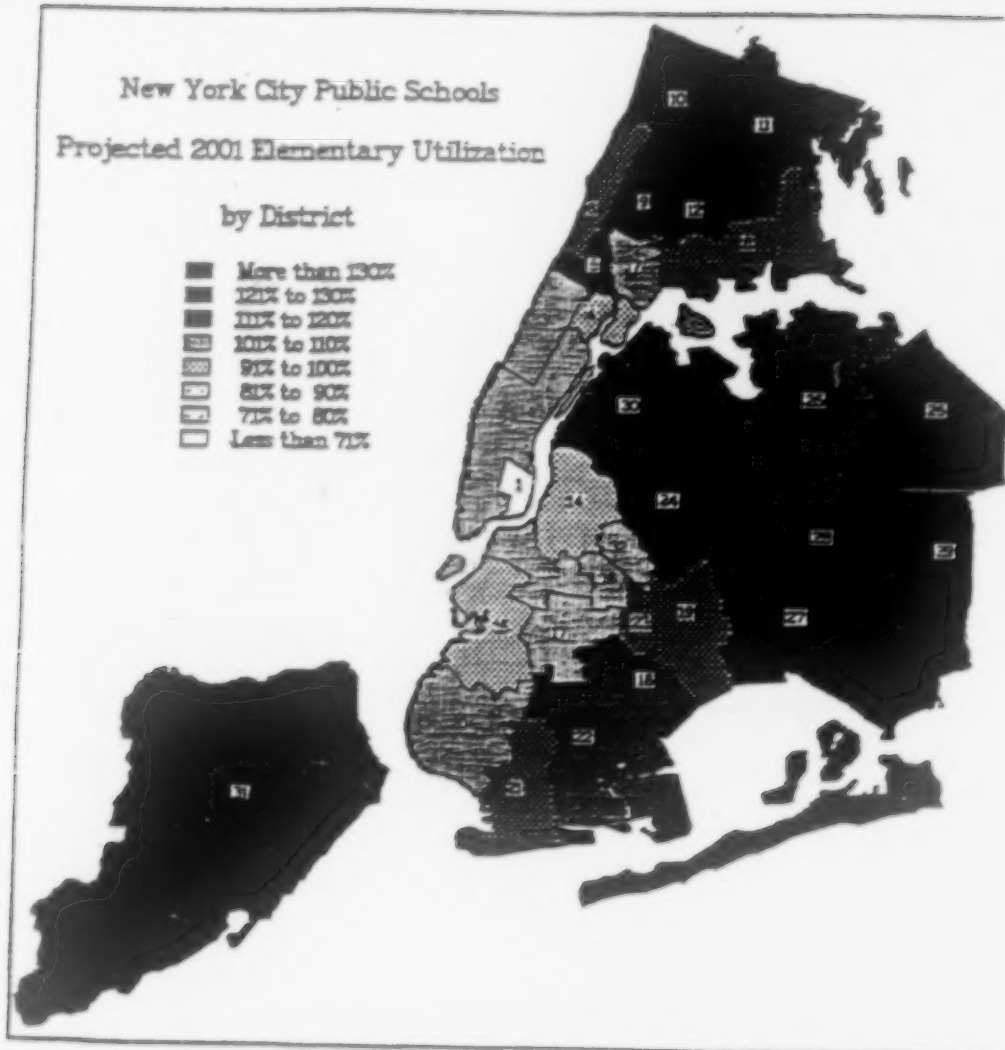
- 20 Lunch rooms are usually not expanded for high school modernizations. Loss of space occurs for science labs, computer labs, etc.
- 21 1991 utilization figures used. This is old data.
- 22 1993 audited enrollments were available when they issued this draft.
- 43 High schools do not have assembly. Gym classes and lunch cannot handle all students in overlapping shifts.
- 47 Double shifts require an increase in the budget given to schools for administration. Also, school safety would need additional safety officers. In addition, extracurricular activities would be more difficult to offer since we would no longer have the traditional "after school" time.
- 50 Switching to year round schools would require further study. Schools would also need to be air conditioned.
- 52 Air conditioning is installed in new buildings, but not in modernized facilities.



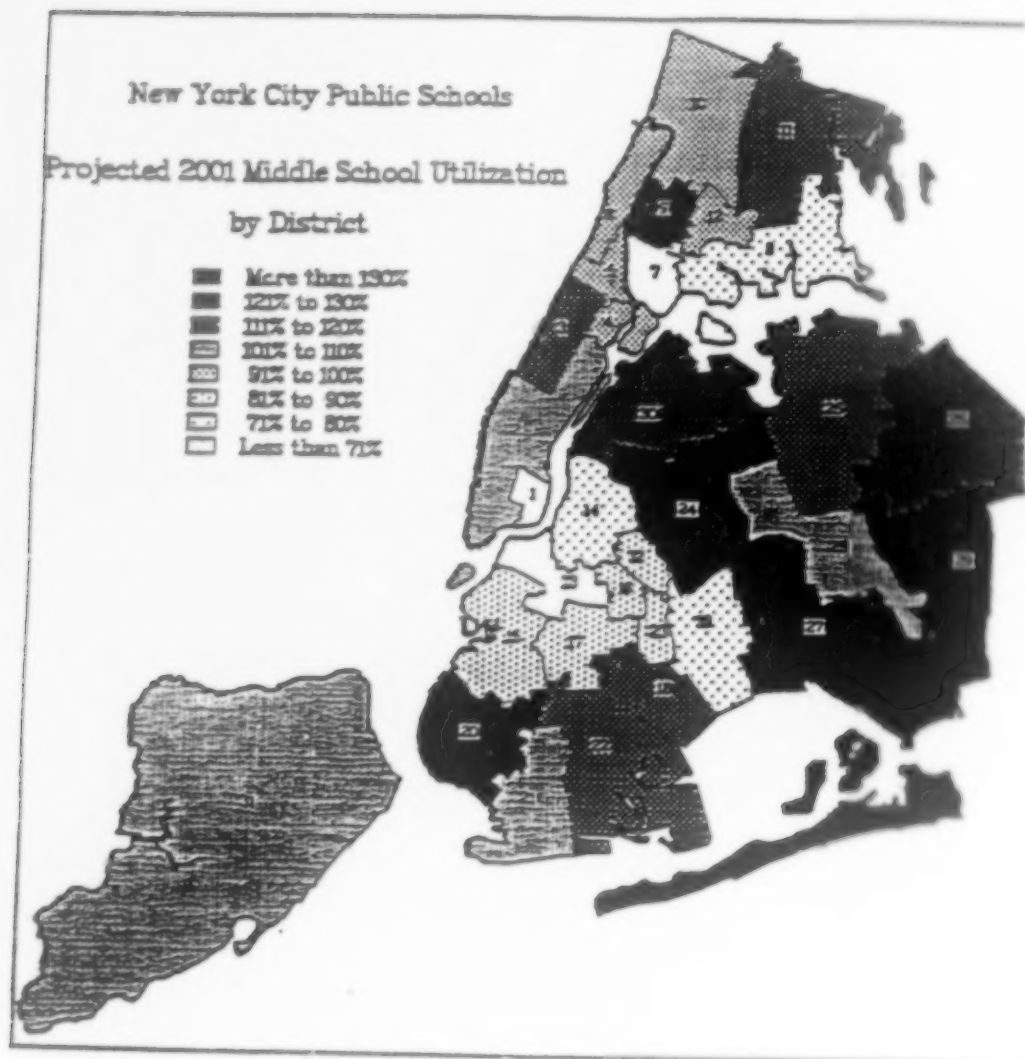
Source: New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.51



Source: New York City Board of Education, Year 2001 Master Plan, April 28, 1995, p.83.

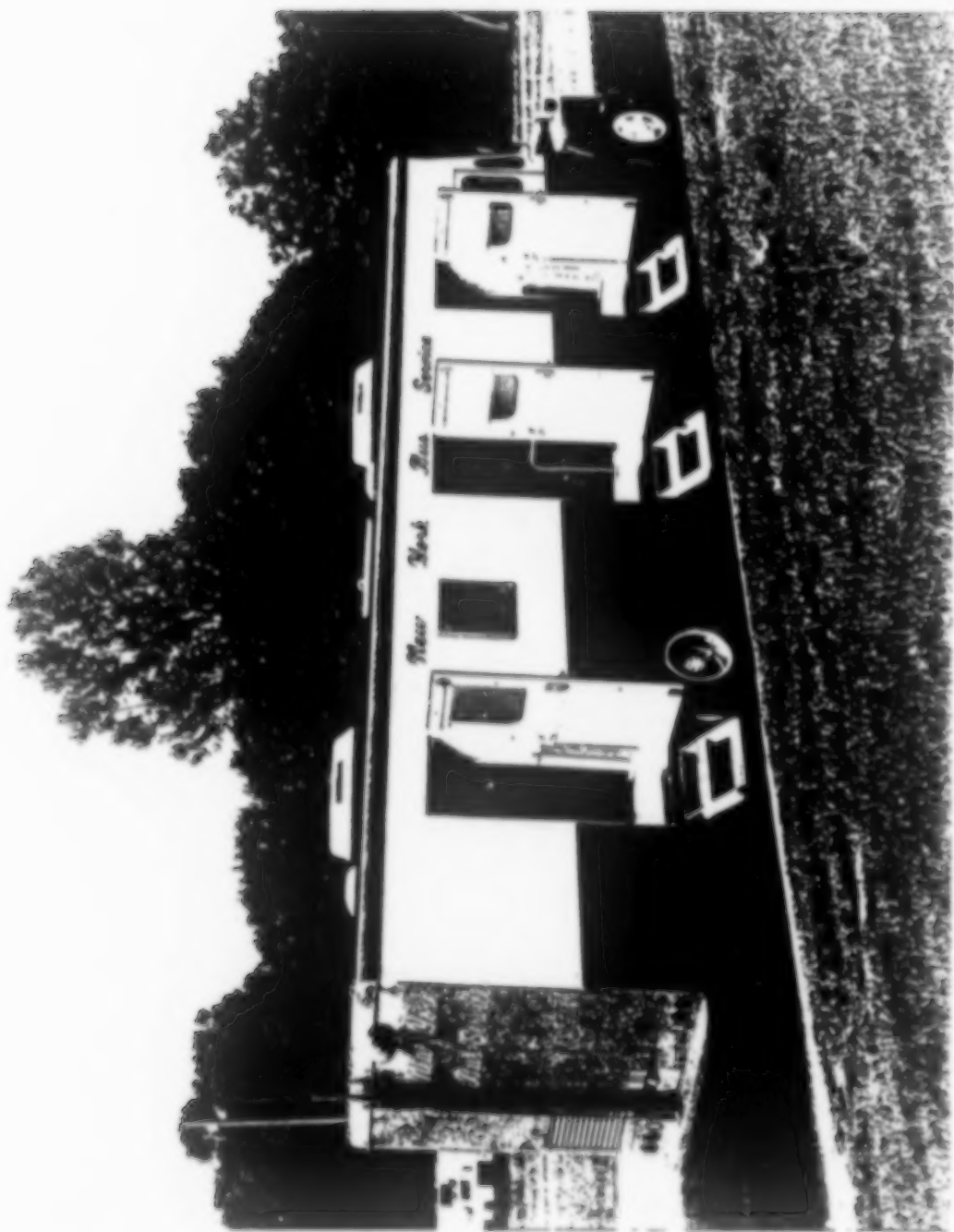


Source: New York City Board of Education, Year 2003 Master Plan, April 28, 1993, p.66.



Source: New York City Board of Education, Year 2001 MAJOR PLAN, April 28, 1993, p. 67.







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ADDITIONAL
GUIDANCE
ON
AGUILAR v. FELTON
AND
CHAPTER 1 OF THE
EDUCATION CONSOLIDATION AND
IMPROVEMENT ACT (ECIA)
QUESTIONS AND ANSWERS

June 1986

CONTENTS

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<u>Question:</u>	24	Requirements for consultation	1
	25	Time of consultation	1
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	27	Appropriate stages for consultation	2
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24. Question: What are the requirements for consultation with private school officials?

Answer: Section 200.70 of the Chapter 1 regulations states that the LEA shall provide services to children enrolled in private schools "in consultation with private school officials."

25. Question: When should this consultation take place?

Answer: The LEA should first consult with private school officials before making any decision that significantly affects the opportunities of private school students to participate in the project. Therefore, consultation should take place before the LEA designs a plan to serve private school students. Consultation should then continue at appropriate stages throughout the term of the project.

26. Question: Should this consultation include discussion regarding the method the LEA will use in serving private school students?

Answer: Yes. While the LEA has final responsibility for deciding how and where services will be provided consultation with private school officials should be an integral part of making those decisions.

27. Question: At what stages during the term of the project is consultation appropriate?

Answer: Consultation should occur before important

decisions are made on the project, including when determinations are made concerning -

1. which children will receive benefits;
2. how the children's needs will be identified;
3. what services will be offered;
4. how and where those services will be provided; and
5. how the project will be evaluated.

A unilateral offer of services by the LEA with no opportunity for discussion is not adequate consultation. To ensure that proper consultation and offers of equitable services are documented the use of a form detailing the consultation and offers, with a place for the signature of private school officials may be useful.

28. Question: Can Chapter 1 instructional personnel consult with private school personnel?

Answer: Yes. Chapter 1 teachers and other instructional personnel can consult with instructional staff from the private school in order to coordinate the Chapter 1 program with the regular classroom instructor and to facilitate the success of the services provided. Such consultation should not occur at the site of the Chapter 1 services while the services are being provided. To the extent practicable, the LEA may wish to have this consultation occur at a public

school site, other neutral sites, or by telephone.

29. Question: May LEAs use mobile vans or other portable units to provide Chapter 1 services to children enrolled in religiously-affiliated private schools? If yes, where may an LEA place a mobile or portable unit?

Answer: Yes. The use of mobile or portable units for the provision of Chapter 1 services to private school children is allowable. In deciding where to place a unit LEAs should be aware that the Supreme Court has previously held that the Establishment Clause of the First Amendment is not violated when units are located on public property near the private school. See Wolman v. Walter, 433 U.S. 220, 246-47 (1977). Such locations, as well as other locations not owned by the private school or a religious organization are plainly acceptable sites for mobile or portable units.

The Court has not ruled on the constitutionality of placing a mobile or portable unit on property belonging to a religiously-affiliated private school and there may be differing views on this subject. Given existing case law, it is the view of the Department of Education that, under certain circumstances mobile or portable units may constitutionally be placed on such private school property.

The Department of Education believes that the courts would approve delivery of services in locations on private school property that fit the Supreme Court's characterization of the site that it found acceptable in Wolman v. Walter, i.e., a site "neither physically nor

educationally identified with the functions of the nonpublic school." While the Court has not held that other locations are constitutionally impermissible, we believe that services at locations fitting this characterization are most likely to withstand judicial scrutiny. The Department of Education believes that one way in which the use of a mobile or portable unit at a given location on the property of a religiously-affiliated private school will comport with this standard is if the following conditions are met:

1. The property is at a sufficient distance from the private school buildings so that the mobile or portable unit is clearly distinguishable from the private school facilities used for regular (non-Chapter 1) instruction.
2. The mobile or portable unit is clearly and separately identified as property of the LEA and is free of religious symbols.
3. The unit and the property upon which it is located are not used for religious purposes or for the private school's educational program.
4. The unit is not used by private school personnel.

In addition to the conditions stated above, an LEA may find that following two further guidelines may bolster its decision to locate units on the property of a religiously-affiliated private school:

1. Before placing a unit on private school property, the LEA can determine that other locations for the services are unsafe,

impracticable, or substantially less convenient for the children to be served.

2. The public school district could enter into a lease arrangement with the private school for the use of the land owned by the private school upon which the unit is to be sited.

30. Question: What are some examples of property owned by a religiously-affiliated private school that would meet the above criteria?

Answer: Such property might include:

1. Land near the school that is separated from the school by an undeveloped plot of land or other terrain features and that is used neither for religious purposes nor for the school's educational program.
2. A portion of a private school playground that is fenced in and has direct access to a public street.
3. Those portions of a parking lot that are not immediately adjacent to the private school.

31. Question: May a religiously-affiliated private school building be used as a power source for a unit?

Answer: Yes. There is nothing to prohibit public schools from arranging for power from any source. However, care must be exercised in the placement of the unit to make certain that the unit is separate from the private school building. If the use of the power

source results in the need for repair, remodeling or construction of private school facilities, Chapter 1 funds may not be used for such repair, remodeling or construction. (See 34 C.F.R. § 200.75).

32. Question: May the LEA pay the private school with Chapter 1 funds for the power or for leasing property?

Answer: Yes. The private school, however, may not charge more than a reasonable amount as determined under local conditions.

33. Question: Who is responsible and liable for the safety of private school children during the time they walk or ride to a neutral site to be served by the Chapter 1 program?

Answer: Generally the LEA is responsible for providing for the transporting of these children to a neutral site. The question of liability, however, would be determined in accordance with state and local law and would depend on the specific facts of the situation. Any increased cost to the LEA for having liability insurance coverage may be charged as an administrative cost to the Chapter 1 program.

34. Question: What can a small rural LEA with a small Chapter 1 allocation do to provide equitable services consistent with the Felton decision?

Answer: Rural LEAs may have special problems due to small allocations and large distances between the private schools and available locations for providing Chapter 1 services. The LEAs may wish to consider

leasing rather than purchasing equipment, renting a neutral site or using home tutoring components to provide equitable services. They may also wish to set up a joint project with neighboring LEAS, and submit a combined application.

35. Question: May equipment be placed on the premises of a religiously-affiliated private school to provide computer assisted instruction (CAI) under Chapter 1 to eligible children enrolled in the school?

Answer: Yes. CAI may be provided with equipment placed on the premises of a religiously-affiliated private school under certain circumstances. We believe that such a placement will withstand judicial scrutiny if the following criteria are met:

1. As with all Chapter 1 programs serving private school children, the CAI program must be under the LEA's direction and control. On-site review by public school officials must be limited, however, to such things as the installation, repair, inventory and maintenance of equipment.
2. Private school personnel may be present in CAI rooms to perform limited non-instructional functions such as to maintain order, to assist children with equipment operations (such as turning the equipment on and off, demonstrating the use of the computers, and accessing Chapter 1 programs), and to assist with the installation, repair, inventory and maintenance of the equipment.

3. Neither public nor private school personnel may assist the students with instruction in the CAI room. Public school personnel may however, assist by providing instruction through computer messages, by telephone, or by television.
 4. Access to the computer equipment and the rest of the program must be limited to Chapter 2 eligible children.
 5. Equipment purchased with Chapter 1 funds may not be used for other than Chapter 1 purposes. Only software directly related to the Chapter 1 program may be used with the CAI.
36. Question: Does CAI by itself meet the equitability requirements of Chapter 1?

Answer: Under the Chapter 1 statute, eligible private school children must receive services that are equitable in comparison to the Chapter 1 services provided to public school children in terms of both the quality and the costs of the services. When both public and private school children are receiving the same CAI service, the equitable services requirement of Chapter 1 is met. When CAI is being provided to private school children while public school children are receiving direct instruction from a teacher, the question of equitability is more difficult. This may be especially true in a year after the computers were purchased since, after the initial purchase of equipment CAI normally provides services at a cost less than the typical Chapter 1 program. (This

problem may not exist, however, if the cost of the equipment is spread out over a number of years. (See Question 37.))

Whether the services provided by an LEA to private school students are equitable to those provided to children in public schools is measured by factors discussed in question 12 of the August 15, 1985 guidance issued by the Department, such as whether the private school children's needs are addressed on the same basis as public school children, whether the services cost about the same, whether the opportunity to participate is about the same, whether the services are relatively convenient, and whether the quality of the services is comparable. If the CAI alone does not provide this equity, the LEA may make up the difference by offering additional services, such as tutorial centers or appropriate summer school programs. Of course, private school children may choose to participate in only a portion of the services offered, and the offer may still be considered equitable.

37. Question: May the cost of purchasing a computer be spread out over a period of years for the purpose of meeting the equitable costs requirement?

Answer: The cost of a computer may be spread over a period of years by such means as leasing the equipment, arranging for a lease-purchase agreement or by paying for the equipment in installments. The LEA may also buy the equipment with local funds, and at the time of purchase agree to have the Chapter 1 program proportionately reimburse the local funds each year.

38. Question: What is the effect of the guidance in these questions and answers on possible audit exceptions?

Answer: This guidance deals with extraordinarily difficult issues, including complex issues of constitutional law. Therefore, Department officials responsible for issuing final audit determinations do not intend to issue audit determinations to disallow expenditures consistent with the interpretation of Felton set forth in this guidance and the guidance issued on August 15, 1985, or consistent with another reasonable reading of Felton and other Establishment Clause cases. If there is a definitive ruling on any of these issues at a future date, the Department's audit policy may change with respect to expenditures made after that time. In the event this occurs, the Department will notify grantees accordingly. Nothing in this answer, however, in any way excuses an LEA or SEA from fully complying with applicable statutes and regulations, including the Chapter 1 equitable services requirement.

NEW YORK CITY PUBLIC SCHOOLS

Joseph A. Fernandez
Chancellor

Neutral Site - 1
1990-1991

Guidelines - Staff Assigned to Neutral Sites
September 1990

1. *Scheduling Students' Instruction*

Instructional Program

The instructional program for all schools should begin during the week of October 1, 1990 in the neutral site.

For those students who will be bussed between the nonpublic school and the neutral site for instruction, a matron will provide supervision for the children while they are traveling between schools.

All groups should be scheduled for 45 minutes of instruction when appropriate between the hours of 9:10 a.m. and 2:15 p.m. (See Attached Proposed Schedule for Shuttle.)

In order to minimize the number of times per week the students will be transported between the nonpublic

school and the neutral site, whenever possible the following guidelines should be implemented:

Schedule students for two sessions of instruction within your program.

If a student receives a combination of services, i.e., Corrective Reading and Corrective Mathematics and/or Corrective Mathematics and English As a Second Language, schedule these students for one period of reading followed by mathematics, etc.

The schedule for teachers who are assigned to neutral sites is 8:40 a.m. to 3:00 p.m.

The schedule for guidance counselors who are assigned to neutral sites is 8:30 a.m. to 3:00 p.m. with one-half hour lunch period.

The schedule for school psychologists and school social workers assigned to neutral sites is 8:00 a.m. to 3:10 p.m. with one-half hour lunch period.

2. Consent Forms

Staff is to maintain a listing of names of nonpublic school students for whom there is a consent form on file in the nonpublic school. It is not necessary to retain the actual consent form in your file. In addition, a copy of this listing is to be submitted with teacher's Groups and Programs.

3. Teacher Attendance

If a teacher will be absent he/she must call the

Coordinator's office by 8:00 a.m. and the nonpublic school to which he/she is assigned.

If you are aware of an absence in advance, please notify your program coordinator and the nonpublic school principal.

4. **Reporting Accidents**

In the event of an accident to a nonpublic school student while on the premises of the neutral site, notify the nonpublic school principal immediately as well as the Director's office.

In the event of an accident to a Central Chapter 1 staff member, notify your Chapter 1 office immediately.

5. **Timekeeping Procedures**

Staff assigned to neutral sites only will record their attendance on a daily basis on a time sheet. Time sheets are to be submitted to your coordinator on the last working day of each month.

In certain instances, staff may have a split assignment, i.e., public school and neutral site. Staff who are assigned on this basis will submit both a time card (if required) and time sheets on the last working day of each month to your program coordinator.

If the public school to which you are assigned no longer requires the Chapter 1 teacher to clock in and out, you will follow the school's procedure and fill in

your timesheet to reflect the exact time of arrival and departure.

6. Safety Procedures

In order to ensure the safety of the Chapter 1 staff and students, no unauthorized and/or unidentified visitors may enter the neutral site classrooms until clearance is obtained from the central office.

All emergencies should be reported by telephone to the nonpublic school principal and your Chapter 1 coordinator office by the Chapter 1 staff.

Doors are to be closed at all times.

Students are never to be left unsupervised.

7. Fire Drills

Rules and regulations will be reviewed by the Fire Drill coordinator who has been assigned to your site. If you have any questions, please call your coordinator.

8. Paraprofessionals

If you have a central program paraprofessional assigned to your school, please obtain from your coordinator a copy of the paraprofessional guidelines.

9. Aguilar V. Felton

As previously stated, please be reminded that, in accordance with the Aguilar v. Felton decision staff

is prohibited from providing teaching or counseling services on the premises of religiously-affiliated schools.

10. Instructions for Completion of Payment Authorization for Shuttle Service (See Attachment) [Chart omitted]

Instructions for Completion of Payment Authorization for Shuttle Service

The Payment Authorization for Shuttle Service is a three part form. It is kept on the bus for the Chapter 1 teacher to make an entry each time the bus leaves children at the public school/neutral site.

Contractors enter the following information on the first days of service each month:

- *district number*
- *name of nonpublic school*
- *name and address of public school/neutral site*
- *contractor's name*
- *run number*
- *month service is being delivered*

Teachers enter the following information on a daily basis:

- *date*
- *appropriate symbol to denote bus action*
- *initials (upon arrival of the last session)*

Teachers enter the following information on the last school day of the month:

- *the total number of days serviced*
- *your signature and the date*

Teachers should retain the last copy of the form for their records.

Contractors will be left with two copies of the form. The top copy of the form is to be forwarded to the Office of Pupil Transportation with the Official Invoice for Shuttle Service. The remaining copy is for the contractor's records.

NEW YORK CITY PUBLIC SCHOOLS

Joseph A. Fernandez
Chancellor

Guideline #1

Guidelines For Staff Assigned to MIUs
1990-1991

Time-Keeping Procedures

Time sheets will be used to record attendance. In certain instances, staff may have a split assignment, i.e. public schools and MIU or CAI and MIUs. Staff who are assigned on this basis will submit one time sheet on the last working day of each month to the program coordinator.

Reporting Teacher Absence

Each staff member is to notify his/her program office no later than 8:15 a.m. on the day of absence. In addition, please notify the nonpublic school principal so that groups scheduled for instruction on that day can be canceled. DO NOT CALL NEW YORK BUS SERVICE.

If you are aware of an absence in advance, please notify

your program coordinator and the nonpublic school principal.

Time Schedule & Testing Procedure

In most instances, MIUs will report to the nonpublic school location on Wednesday, September 5, 1990. However, if a nonpublic school is not scheduled to receive service on a Wednesday, the MIU will report on the first day of scheduled Chapter 1 services.

Staff will administer their diagnostic testing program in the MIUs after students have been oriented to the new setting. However, in some instances in order to facilitate the testing program and where there is a large room available, testing may be conducted in the MIU and in the nonpublic school.

Scheduling For Instruction

Most groups will be scheduled for 45 minutes of instruction with the exception of 60 minute periods that have been scheduled for some of the MIU sites.

In order to minimize the number of times per day or per week the students will leave the building, whenever possible the following guidelines should be implemented:

For those students who receive a combination of services; i.e., Corrective Reading and Corrective Mathematics and/or English As a Second Language, schedule these students for one period of reading followed by mathematics, etc.

Teachers should be adaptable and arrange their conference

periods among themselves to avoid conflicts.

Priority for the utilization of the guidance area is for Clinical and Guidance Services, i.e., guidance counselor, psychologist, and social worker. (When assigned)

Conference/Preparation Periods

In a few instances, staff assigned to MIUs will report to the nearest public school for their conference/preparation periods. Please note that lunch hours cannot be scheduled for the first period or the last period of the day. Public school principals will be notified as to the specific days and times that Chapter 1 staff will be reporting in order to complete assignments relevant to Chapter 1 nonpublic school matters.

When applicable, staff will leave their time cards in the rack provided in the public school office so that the principal will be aware that you are in the building. You will remove the time card when you leave the building.

Consent Forms

Staff is to maintain a listing of names of nonpublic school students for whom there is a consent form on file in the nonpublic school. It is not necessary to retain the actual consent form in your file.

Escorting Students

Please be reminded that students are to be met at the outside

entrance to the nonpublic school by the MIU driver or the Chapter 1 staff who will escort the students to the place of instruction. Staff is not to enter the nonpublic school in order to pick up students.

Reporting Accidents

In the event of an accident to a nonpublic school student while in the MIU or on the premises of a neutral site, notify the nonpublic school principal or his/her designee immediately. In addition, notify your program office for specific instructions and procedures.

In the event of an accident to a Central ESEA Chapter 1 staff member, notify your Chapter 1 office immediately.

MIU Monthly Verification Forms

In completing the monthly verification forms, the following procedures must be adhered to:

Only Chapter 1 personnel should complete the forms.

These forms should be filled out and initialed on a daily basis. The first teacher with an instructional period should sign the MIU in and the last teacher with an instructional period should sign the MIU out.

The information entered must reflect the exact time of arrival and departure. If there is a change in the arrival or departure times, this information is to be reflected on the MIU verification form.

Chapter 1 staff designated to mail the Monthly

Verification Forms on the last school day of each month must follow the procedures outlined below:

Give the first and second copies of the form to the MIU driver.

Send the third and fourth copies of the form to the following address:

*Bureau of Nonpublic School
Reimbursable Services
347 Baltic Street Rm. 211
Brooklyn, N. Y. 11201
Attention: MIU*

Cancellation of Chapter 1 Classes During the Instructional Day

In the event that Chapter 1 classes are canceled during the course of the instructional day, the MIU is to remain at the site and staff is to complete required Chapter 1 related duties. No MIU may leave early, unless it is approved by the Director's office.

School Closings

If a nonpublic school is closed and it is mutually agreeable to the principal and the Chapter 1 staff, we will arrange to have the MIU at the school in order for staff to complete activities related to the Chapter 1 programs. Only one MIU will be dispatched to each school.

Staff is not to call New York Bus Service. All

questions and/or problems relating to the MIUs are handled through the front office.

Safety Procedures

- *In order to ensure the safety of the Chapter 1 staff and students, no unidentified visitors may enter the MIU until clearance is obtained from the Central Board of Education office.*
- *All emergencies should be reported via the communication system to the nonpublic school principal by the Chapter 1 staff or the driver. In addition, the Director's office should be notified.*
- *Doors must be kept closed at all times.*
- *Drivers are to escort pupils in and out of the building, if necessary.*
- *Students are never to be left unsupervised in an MIU.*
- *There is to be no smoking in any section of the MIU.*
- *Duplicating machines are not allowed on the MIU.*
- *The MIU aisles must be kept clear at all times.*
- *Children's clothing should be hung on the hooks provided in the vehicle.*
- *Only the Chapter 1 staff or the driver may regulate the temperature controls.*
- *We strongly suggest that female staff not wear high*

heels in the MIU.

Parking Problems

In the event the MIU cannot park in its designated spot and you are unable to hold classes, you are to notify Carole Kaufman immediately at (718) 935-4164. We will call the local precinct to have the cars ticketed and/or towed. The MIU will park in the nearest legal spot. If it is close enough to walk the children, you may hold your classes; if not, you will do Chapter 1 related work in the MIU. You may not work in the nonpublic school.

Fire Drills

Staff should be aware of the location of the nearest fire alarm box.

Refer to the special memo for procedures for fire and evacuation drills for MIU's.

Duties of the Driver

The Driver Will:

- 1. Adhere to the MIU time schedules determined by the Board of Education.*
- 2. Arrive on time at the site or sites.*
- 3. Call the dispatcher if the MIU will be late.*
- 4. Stay at the site in the MIU during the hours scheduled.*
- 5. Park at the designated location, unless it is unavailable.*

6. *Escort pupils out of school to the MIU and from the MIU back to the school. If the children must cross a street, the driver must cross with them at an intersection.*
7. *Take a lunch time determined by the teacher. When the MIU is scheduled at two locations in one day, the driver shall be assigned a lunch break at the first location. If more than one MIU is at a site, lunches should be staggered to avoid absence of all drivers at a particular time.*
8. *Take a lunch break of 45 minutes to one hour, as directed.*
9. *Use appropriate language with the children.*
10. *Call the dispatcher if there is a problem not covered by the rules listed above.*

MIU Violation Forms

Attached for your information is a copy of the MIU Notice of Violation form. If a violation occurs, please contact Carole Kaufman at (718) 935-4164 as soon as possible for appropriate follow-up by the Central office.

Aguilar v. Felton

AS PREVIOUSLY STATED, PLEASE BE REMINDED THAT, IN ACCORDANCE WITH THE AGUILAR V. FELTON DECISION, STAFF IS PROHIBITED FROM PROVIDING TEACHING OR COUNSELING SERVICES ON THE PREMISES OF RELIGIOUSLY-AFFILIATED SCHOOLS. [Notice of Violation Form Omitted]

New York City 347 Baltic Street
Board of Education Brooklyn, N.Y. 11201

Bernard Macklowitz
Chancellor

Joseph J. Saccente
Chief Executive for
Operations

Bureau of Nonpublic Schools
Reimbursable Services
Margaret O. Weiss
Director
(718)935-4164

Guidelines for Staff Assigned to CAI - #1
1989-1990

For All CAI Teachers

The following timekeeping procedures will be adhered to:

The official work hours at Baltic Street are 8:40 A.M. - 3:00 P.M. Teachers will sign the attendance books in their respective offices, noting the exact time of arrival and the exact time of departure. Additionally, they will record their time on their time sheets.

For teachers who have a split assignment, i.e. CAI and a public school or a neutral site or a MIU please refer to the appropriate guidelines for timekeeping procedures.

Testing Procedures

In order to expedite testing of students in the CAI program, CAI teachers assigned to the same school will work as a team. Whenever possible, CAI teachers from all the programs should coordinate their testing days so that testing might be done expeditiously. The principal must be called

before any testing is planned. The noninstructional technician will accompany the teachers to aid them in noninstructional tasks associated with the testing procedure, where feasible.

Staff will administer their diagnostic testing program in the nonpublic public school and upon completion, the teacher must leave the nonpublic school and return to Baltic Street in order to register the participants.

Student - Teacher Ratio

The student - teacher ratio for CAI only schools is as follows:

<u>FTE</u>	<u>Range</u>
.1	20-35 students
.2	36-60 students
.3	61-84 students
.4	85-105 students
.5	106-130 students
.6	131-150 students

Scheduling For Instruction

Based upon past experience, the following should serve as a guide in scheduling for instruction. Schedules should be determined based on the needs of the students and in consultation with the nonpublic school principal. In some cases the principal might request a different configuration.

In CAI only schools, most students will be scheduled for 30 minute periods three times a week (for a total of 90

minutes) if he/she is enrolled in only one subject area. If a student is enrolled in more than one subject area then he/she will be scheduled for a thirty minute period twice a week for each subject. If a child is receiving combination services i.e., MIU and CAI, he/she is then scheduled for CAI Instruction for two periods a week, and interfacing with the teacher once a week. In some cases, students may be registered for only CAI instruction in a combo school. These students should be scheduled for three thirty-minute periods.

The noninstructional technician works 5 1/2 hours per day exclusive of lunch. When scheduling, please keep in mind that the technician needs 15 minutes at the beginning of each day to bring up the computers, and ten minutes at the end of the day to close down the computers.

CHAPTER 1 STAFF, OTHER THAN THE TECHNICIAN, CANNOT BE IN THE NONPUBLIC SCHOOL WHILE STUDENTS ARE RECEIVING INSTRUCTION VIA CAI.

Technicians

Teachers must maintain close communication with the noninstructional technicians. The following procedures are to be implemented:

- Contacting technicians between 8:40 a.m. and 9:15 a.m. to ascertain if there are any equipment problems, or changes in school schedules, etc.
- Notifying the technicians regarding your assigned CAI schedule at Baltic Street.

Duties of the CAI Teacher

As you are aware, the CAI program will be expanded to include periodic telephone communication with students who receive CAI only instruction. Teachers will be required to call the students and discuss any problems that appear when computer printouts are analyzed. Once telephone schedules have been established on a school-by-school basis, the Chapter 1 teachers will communicate this information to the technicians.

In addition, Chapter 1 teachers will be responsible for the following procedures:

- *All teachers are to register the students in the appropriate courses.*
- *Each teacher is required to run a printout of student lessons every two weeks for his/her own use.*
- *Principals will get printouts every three or four weeks. The technician will run the reports at the school only at the direction of the teacher.*
- *Teachers should call the non-public principal monthly to discuss the printouts. These calls should be logged and saved for future reference in the school folder.*
- *Each teacher must complete a separate folder for each student. The folder should contain an Individual Student Profile form which will itemize the following information: the pre and*

post test dates and scores for that child, his/her initial placement, and changes in that child's prescription and any relevant information obtained from analysis of the printouts and/or telephone conversations.

- *Additionally, each student must have a separate folder. That folder should contain a student master list, a schedule of the CAI program, and a list of all the teachers assigned to that school. This procedure should be coordinated with Heidi Khalak (room 102) or Gilda Bucca (room 207).*
- *It is expected that each teacher will preview lessons to aid them in initial placement and adjustments in prescriptions. Forms to record reactions to these lessons will be available and should be filled out, placed in a separate book and made available to the other CAI teachers in each program for review. A copy of these previews will also be kept in your Coordinator's office.*

CCC Teachers

- *A speech component is being added to all CCC schools with more than two computers. This should be available in October.*
- *All registration is done by the teachers. All changes are to be made by the teacher.*
- *Worksheets are to be generated at Baltic Street by the teacher and the automatically*

sent to the printer in the nonpublic school. PLEASE DO NOT SEND THE ANSWER SHEETS. The noninstructional technician will be provided with stamped envelopes and will mail the completed worksheets to you. Worksheets are to be generated on an "as needed basis," and teachers are encouraged to utilize them for practice and/or enrichment. These worksheets are not to be considered homework assignments.

- Printouts should be generated every two weeks by the teacher, so that students' work can be closely monitored. (Gains Report and/or Student's Report)
- Printouts to the principal should be generated by the technician under the teacher's supervision, every three or four weeks. Instructional staff should ascertain whether the principal prefers the Student Report or the Class Report.
- Workbooks are used for the higher level computer programs. Teachers should periodically collect and mark the workbook pages and mail them back to the students.

ESC - "Jostens Learning Corporation"

- Menus were made smaller to expedite the registration process.
- Registration must be done by the teacher. Teachers will assign students an ID number

and place the students at the appropriate level. If a child is registered in two subject areas, each teacher must register the child separately, using a different ID number. If a child was in the CAI program last year, please refer to last year's printouts to determine levels completed. The computer will keep subject area files separately.

- *Each school will be updated weekly by Heidi, so that you will be able to get the latest printout.*
- *Teachers are expected to run printouts for their own use every two weeks (Student Lesson Report). It is recommended that these reports be staggered, i.e. on week 1, print out reports for those students in grades 1-3, and on week 2, print out reports for those students in grades 4-6. This will allow you to evaluate individual progress and make appropriate changes in the child's prescription. Reports can be printed at any time during the day whether or not the lab is in use.*
- *If you wish to diagnose the student results, you can review the report on the screen before printing.*
- *Each printout will contain "minutes to complete" information. Teachers are to keep an ongoing record of the time each student spent on the computer so that they will be able to complete the time on task information at the end of the year. This information must*

be compiled on a monthly basis on the Individual Student Profile form.

- *Principals will receive printouts every three or four weeks. Under the teacher's direction, the technician will print out the report and give it to the principal. It is recommended that principals be given the Student Status Report, and then, if needed, the Student Lesson Report. Teachers should discuss these options with the principal.*
- *When a change it to be made in a child's program, the Program Change Form, available in Room 102, is to be filled out. These changes can only be made when the children are not working on the computers. If you cannot get to the computer, please give the form to Heidi. She will make the change, initial it and return it to you. Those forms are to be kept in the school's folder for future reference.*
- *All changes must be made at Baltic Street. No changes are to be made at the nonpublic school.*
- *Tutorial is now available for each student. This should take approximately 10 minutes and all students should be registered for it.*

WICAT Teachers

- *All computers were replaced and the WICAT System is now running on IBM hardware.*

- *A new program entitled "Make a Test" will be installed later this year. Using this program, teachers can create their own computer assignments. Training for this new program will be provided in the early Fall.*
- *Reading 1 and Math 2 have new placement tests. Teachers may use these tests to aid in student placement.*
- *For Reading 2, Dynamic Placement may be used. Teachers will be trained in this placement.*
- *For students who were in the program last year, it is recommended that you refer to printout reports for placement test assignments.*
- *Teachers assigned to WICAT schools should work as a team in the registration process. Registration forms are available to facilitate this process.*
- *It is important that you monitor the student's work very closely since the lesson will keep repeating if the student is not performing at mastery level.*
- *Teachers will instruct technicians to generate Student Reports on a monthly basis and distribute them to the principals. Teachers should generate reports every two weeks for their own use.*

- *ESL reports can only be generated at the school. Technicians will be supplied with stamped, self-addressed envelopes and instructed to mail them to the ESL office every two weeks.*

PLATO Teachers

- *Students are to be registered and placed in their appropriate courses at Baltic Street.*
- *Since printouts are generated on an individual basis and are time consuming, it is essential that a schedule be established and adhered to.*

NEW YORK CITY PUBLIC SCHOOLS

JOSEPH A. FERNANDEZ

Guidelines For Selection of Chapter 1 Participants And Testing Procedures 1990-1991

1. Selection of Participants - Corrective Reading and Corrective Mathematics Programs

In consultation with the nonpublic school principal, staff is to follow the guidelines listed below when selecting students for participation in the Chapter 1 program.

In order to initiate services for September 1990, Chapter 1

Corrective Reading and Corrective Mathematics teachers must refer to the Chapter 1 Eligibility Survey that is being submitted by September 28, 1990.

As in the past, priority must be given to those students who are in the greatest need of remediation.

Use National Percentiles, or PEP or DRP scores when selecting students.

Students should be selected in each grade, in rank order, for program participation starting with the student with the lowest percentile. Please note that there may be a wide range of percentile scores, from grade to grade, i.e., 4th grade participants' percentile scores may range from the 5th percentile to the 23rd percentile while 7th grade participants' percentile scores may range from the 10th percentile to the 30th percentile.

In grades 3 and 6, children who are eligible based on their DRP or PEP scores should receive priority for placement in the program.

When two students have the same percentile and are being considered for participation in the program, priority should be given to the student who participated in the program during 1989-1990.

2. Selection of Participants - English as a Second Language Program

There has been no change in the selection criteria for participation in the Chapter 1 English as a Second Language program.

3. Testing Procedures - All Chapter 1 Programs

Students who participated in the Chapter 1 program during 1989-1990 and who are being nominated for Chapter 1 services in September 1990 need not be pretested. Their Spring 1990 posttest scores will serve as their pretest scores. Only new Chapter 1 nominees will be pretested in September 1990.

Chapter 1 support staff, i.e., guidance counselors, social workers and psychologists, are expected to assist the Chapter 1 instructional staff in the administration of the tests.

If you have any questions regarding these guidelines, please contact your program coordinator.

New York City
Board of Education

347 Baltic Street
Brooklyn, N.Y. 11201

*Division of Curriculum and Instruction
Office of Special Projects
Bureau of Nonpublic School Reimbursable Services*

*Administrative Procedures for Non-Instructional
Technicians (School Aide) Assigned to Chapter 1
Computer Room*

October 14, 1988

1. *Reporting Absences*

Each technician is to notify Mrs. Carole Kaufman, at (718) 935-4164, no later than 8:15 a.m. on the day of absence. In addition, please notify the nonpublic school principal of your absence.

If you are aware of an absence in advance, please notify Mrs. Kaufman and the nonpublic school principal.

2. *Time Keeping Procedures*

The official work day is 5 1/2 hours, exclusive of lunch. Time sheets will be used to record attendance for each non-instructional technician. If your school is closed, you are assigned to Baltic Street for the day. You are required to punch in and out on the time clock in room 214.

The following information is to be completed on each

time sheet for each month.

- Indicate - Last Name, First Name
- Program - Chapter 1 CAI
- School Number - 347 Baltic Street - Brooklyn, NY
- Dist. 64, Budget Code and Project - Leave Blank
- Period Ending - Indicate last day of each month
- Home Address - Indicate your home address and zip code
- Non-Resident of New York City - No
- License & File Number - Omit
- Social Security No. - Fill in
- Position Title - Non-Instructional Technician (School Aide)
- Position Symbol - Omit
- Official Work Hours - Indicate your official work hours, i.e., 8:10-2:10; etc.
- Social Security Deducted - No

You will record, on a daily basis, exact time of arrival and your exact time of departure with your signature for each working day. Indicate your lunch time in the appropriate box. Please fill in holidays, Saturdays and Sundays.

At the end of each month, please sign the lower left hand corner (Employee) and mail time sheets to:

Mrs. Margaret O. Weiss, Director
Bureau of Nonpublic School Reimbursable Services
347 Baltic Street - Room 211
Brooklyn, New York 11201

Attention: Mrs. Mary Dalto

3. Payroll

Checks will be mailed to your house. If you want us to hold them for you, you must submit a letter stating that we are to hold your check for pick-up. You may not leave your school early to pick up your pay check. The checks will be released at 3:00 p.m. If someone else is going to pick up your check, you must give him/her a letter stating that he/she is picking up the check for you.

4. General Routines

Upon arrival at the nonpublic school you are to report to the Computer Room at 347 Baltic Street via computer or voice telephone (718) 522-1256).

- *Take attendance daily.*
- *Maintain an attractive Computer learning center.*
- *Power up and power down the system each day.*
- *Bring-up and take down curriculum when needed.*
- *Back-up student records.*
- *Report any problems to the Computer Room immediately (Example: Problems with students names, numbers, courses, etc.)*
- *Maintain a log of systems problems.*
- *Label all Chapter 1 equipment and fill out inventory cards in duplicate, send one copy to Mrs. Kaufman, 347 Baltic Street and keep the other copy on file at the school.*

5. General Classroom Procedures:

- *Each Student should be assigned a permanent seat.*
- *Display directions for each computer systems*

- Do not use Chalkboard (computers are very sensitive to Chalk dust)
- Students are not to be left unsupervised in the Chapter 1 Computer room at any time.
- In the event of an emergency, notify the nonpublic school principal or his/her designee immediately. In addition, notify the Director's office for specific instructions and procedures (718-935-4164)
- There is to be no eating or drinking in the computer room.
- The voice telephone in the room is to be used to contact the main office or the computer hotline. It is not to be used for personal purposes. All telephone calls must be listed on the Record of Telephone Calls sheets with the date, number called and person making the call.
- Technicians may show the students how to use the computer. You may not instruct them in anything but the use of the computer. If the school schedule changes you must notify the Director's office immediately for instructions. Technicians do not go on class trips, nor do they report to a school that is closed.

6. Fire Drills

- You are responsible for the safety of the children.
- Ask the nonpublic school principal for the school policy regarding fire drills.
- When there is a fire drill, you will follow the principal's instructions.

7. Dress Code

We are requesting that staff dress professionally at all times. Dungarees, sweat shirts or "T" shirts are not deemed to be appropriate dress.

New York City
Board of Education

347 Baltic Street
Brooklyn, N.Y. 11201

TO: Non-Instructional Technicians

From: Margaret O. Weiss, Director

*Re: Procedures for Non-Instructional Technicians
Assigned to Chapter 1 Computers*

As previously stated, the responsibilities of the non-instructional technicians are related solely to the operation and the maintenance of computer equipment.

Under no circumstances are technicians to instruct children in their lessons. This includes reading and or defining words, and assisting students in mathematical computations.

If a child asks for the definition or spelling of a word, it is permissible to hand him/her a dictionary. —

It is extremely important that all technicians follow the procedures outlined above.

*If you have any questions concerning these instructions,
please contact Carole Kaufman at (718) 935-4164.*

MOW:fld

*CC: Rose McKenna
Thomas Kelly
Carole Kaufman*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL
A. SCHWARTZ, ROBERT
H. SIDE and ALLEN
H. ZELON,

Plaintiffs,

-against-

AFFIDAVIT SETTING
FORTH THE
CHANCELLOR'S
FOURTH
BI-MONTHLY
REPORT
WHICH DESCRIBES
THE
ALTERNATIVE
PLAN

SECRETARY, UNITED STATES
DEPARTMENT of EDUCATION
AND CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF
NEW YORK,

Defendants.

----- -x

STATE OF NEW YORK)
:SS.:
COUNTY OF KINGS)

JOSEPH J. SACCENTE, being duly sworn, deposes

and says:

1. I am the Chief Executive for Operations of the Board of Education of the City School District of the City of New York (the "Board of Education") and have held this or the equivalent position since 1976. I am responsible for implementing policy decisions made by the Chancellor and the Board of Education, particularly as these decisions apply to the thirty-two community school districts. Accordingly, in mid-April 1986, the Chancellor asked me to implement the Board of Education's alternative September 1986 plan for the delivery of Chapter 1 services to sectarian school children.

2. I began my career with the Board of Education as a teacher in 1957, and have subsequently held the positions of assistant principal, Director of State Funded Programs (Community Education Centers), Chief of Staff to the Chancellor and Assistant Superintendent for Operations to the Chancellor, before assuming my present position. I hold New York State certification and New York City Board of Education licenses for the positions of assistant principal (elementary school), assistant principal (junior high school) and principal (elementary school). I also hold New York State certification as a school district administrator.

3. This affidavit describes the Board of Education's September 1986 plan for the delivery of Chapter 1 services to sectarian school children. The plan is the result of a nearly year-long effort to develop a plan that would be as educationally beneficial and cost effective as possible, within the constraints imposed by the Aguilar decision. At the same time, the plan had to satisfy the requirements imposed by the Chapter 1 statute and regulations -- including the requirement that sectarian school children be offered

services which are equitable in relation to those offered public school children.

4. In accordance with this Court's judgment, the plan provides that as of the start of the September 1986 school year, public school personnel will not provide Chapter 1 teaching and counseling services on the premises of sectarian schools within New York City. For a brief period at the start of every school year, children in the Chapter 1 program receive diagnostic testing; we may hold this diagnostic testing in the sectarian schools next fall. Counsel has advised me that in Wolman v. Walter, 433 U.S. 229, 238-244 (1977), the Supreme Court held that it is constitutionally permissible to hold diagnostic testing in sectarian schools.

Summary of the September 1986 Plan

5. For September 1986, the Board of Education has offered Chapter 1 services to sectarian school children at two types of sites: public schools and mobile instructional units ("MIUs"). For the 1986-87 school year, 242 sectarian schools in New York City have been offered Chapter 1 services through the Board of Education's Office of Special Projects. The students in 194 schools (80% of the sectarian schools), have been offered Chapter 1 services in the public schools. The students in 48 schools (20% of the sectarian schools), have been offered Chapter 1 services in MIUs.

6. As the Second Circuit recognized in this case, the alternative methods of delivering Chapter 1 services off the premises of sectarian schools "are almost certain to be less effective, more costly, or both." Felton v. Secretary, United States Department of Education, 739 F.2d 48, 71 (2d. Cir. 1984). Our experience in developing the

September 1986 plan has demonstrated the accuracy of this prediction. Both types of sites which are part of the plan have disadvantages -- either in terms of educational effectiveness or cost -- which make them less desirable than the current on-site provision of services. We anticipate that both the plaintiffs and some of the defendant-intervenors may express dissatisfaction with the plan, albeit for different reasons. However, it is the Board of Education's position that the September 1986 plan is a reasonable solution to a problem for which no ideal solution is now available, and that the September 1986 plan offers equitable services to sectarian school children in a manner consistent with this Court's judgment.

7. The Board of Education will also provide Chapter 1 services during the 1986-87 school year to two non-sectarian private schools, the Melrose Community School and the St. Thomas Community School. Both schools are independent private schools with no religious affiliation. The St. Thomas Community School is operated by a Parent Executive Board composed of parents of students in the school. The Melrose Community School is operated by a School Board composed of parents and community leaders. In the 1986-87 school year, Chapter 1 services will be provided on the premises of these two non-sectarian schools.

8. The remainder of this report describes the September 1986 plan in further detail and explains why it was chosen. The plan is actually 242 plans -- one for each sectarian school in the Chapter 1 program. (The specific plans for the 242 sectarian schools are presented in Exhibits "A" and "B" annexed to this affidavit.)

9. This report is organized, as were our previous

reports to the Court, by separate discussions of the three alternative types of sites for the provision of Chapter 1 services which have been under consideration since last summer -- public schools, MIUs and neutral sites. After reviewing the three types of sites and the factors which determined the extent of their inclusion in our September 1986 plan, this affidavit describes the recent consultation process with sectarian school officials, principals and parents concerning the plan. Finally, this affidavit describes additional alternatives for the provision of Chapter 1 services that will not be available for September 1986, but which may be implemented later in the 1986-87 school year. These include neutral sites, a small number of semi-permanent trailers and an experimental pilot program for the provision of Chapter 1 services in the sectarian schools by an independent, private contractor.

The Three Alternative
Types of Chapter 1 Sites

A. Public Schools

10. Under the plan, school children in 80% of the sectarian schools have been offered Chapter 1 services at a public school as of September 1986. Public school sites were selected for the majority of children because this is the only type of site, of the three under consideration, which is now available and can serve a large percentage of the approximately 21,000 sectarian school children in the program at a reasonable cost.

11. The United States Department of Education has ruled that the administrative costs incurred in providing alternative sites for Chapter 1 services for sectarian school children (for transportation, leasing of neutral space or MIUS, etc.) must be charged against the total allocation of Chapter 1 funds received by New York City.

12. These "off the top" charges reduce the amount of funds available for instruction and counseling services for both public and non-public school children, with the result that fewer children in both groups can be served. Accordingly, in creating a plan which provides equitable services to sectarian school children and meets other applicable legal requirements, a high priority was given to keeping these administrative costs as low as possible.

13. Although the use of public schools is clearly the most cost effective of the three alternatives, that could not be our sole consideration. Every offer of Chapter 1 services to sectarian school children must also meet the equitable services mandate set forth in the Chapter 1 statute

and regulations. The statute requires the Board of Education "to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools." 20 U.S.C. § 3806(b)

14. The Chapter 1 regulations further define this requirement. The regulations state that, "The Chapter 1 services that an LEA [local educational agency] provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children). . . ." 34 C.F.R. § 200.71(b), and that, "The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools." 34 C.F.R. § 76.654(a).

15. Accordingly, our Chapter 1 plan for sectarian school children must offer services which are equitable to those provided to New York City public school children. Approximately 175,000 public school children are enrolled in the Board of Education's Chapter 1 program. They all receive Chapter 1 services in the public schools during the regular school day.

16. To satisfy the equitable services requirement, we have offered the sectarian school children Chapter 1 services during the regular public school day, rather than after school.

17. We rejected an after school program based on the Board of Education's own unsuccessful experience in operating an after school Chapter 1 program for non-public school children, which was similar to the experiences of other school districts. As previously described in the

original record in this case and the Chancellor's Initial Report Concerning an Alternative Plan (§§ 37, 51-52), our experience showed that an after school Chapter 1 program is not as effective as a program operated during the regular public school day.

18. The Board of Education's after school Chapter 1 program for non-public school children was neither as educationally effective nor as well attended as the regular school day program, and was abandoned after one year. Among the reasons for the program's failure were that teachers and students were tired, parents were concerned about younger children coming home in the dark in winter and older children had jobs and other after school activities.

19. Our unsuccessful experience with an after school Chapter 1 program is consistent with that of many other school districts. For instance, in Wamble v. Bell, 598 F. Supp. 1356, 1361 (W.D. Mo. 1984), an after school Chapter 1 program in Missouri was found to have failed because of "student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for safety, students' conception that the after hours program was punishment, and conflicts with family obligations."

20. The major problem we faced, in mounting a large Chapter 1 program for sectarian school children in the public schools during the regular school day, was the shortage of space in some of our public schools. Due to severe overcrowding in the public schools in several community school districts, we were unable to find space in proximate public schools for 20% of the Chapter 1 sectarian schools.

21. Since Chapter 1 services will be offered

during the regular school day, the time students spend traveling between their sectarian school and the public school had to be considered, since this will usually be time lost from their regular instruction.

22. As previously described in the Chancellor's Third Report to the Court (¶¶ 6, 7), in March 1986 we calculated the travel time, door to door, between each sectarian school and the public school or schools with which it had been matched. We based the walking time on an estimated average time of four minutes per block. We measured the driving time by actually driving from one school to the other. Subsequently, we made new matchings for some sectarian schools, to public schools with shorter travel times.

23. To minimize the travel time as much as possible, we established a maximum one way travel time of approximately ten minutes after reviewing this data. We selected this maximum time because it allows us to avoid imposing, on any child, a large loss of instructional time due to travel, while at the same time accommodating most sectarian school children in public school sites.

24. We have offered roundtrip transportation to every child assigned to a public school site during the regular public school day, except where the matched schools are next door or directly across the street from each other. This will increase the number of students who can be served at public school sites, further reduce the travel time of some students who are within ten minutes' walking distance of the assigned public school, and provide supervision for the children while they are traveling between schools.

25. The sectarian school students will be

transported by mini-vans or by standard size school buses. A matron is assigned to each vehicle to supervise the children. These vehicles, which are already under contract to the Board of Education, are now used to transport students between their homes and school at the beginning and end of the school day. The vehicles and matrons will therefore be available, for Chapter 1 purposes, between the hours of 9:00 a.m. and 2:30 p.m.

26. Based on the described considerations, for September 1986, we have been able to offer Chapter 1 services in public school classrooms to students in 194 (or 80%) of the sectarian schools in the Chapter 1 program. (A list of the 194, sectarian schools with the matched public schools is annexed as Exhibit "A".)

27. In some cases, based on preferences expressed by sectarian school officials, principals and parents, we may be able to offer a second public school as an alternative to the matched school Listed in Exhibit "A". For instance, we are investigating the use of Public School 157, which is in District 14 in Brooklyn and has many vacant classrooms, for many of the Hebrew day school children in District 14. Some affected Hebrew day school principals and officials have expressed a preference for this optional offer.

28. In other cases, sectarian school officials and principals have expressed a preference for an after school program in the public schools. We will offer these officials and principals an after school program in a public school as an alternative to the regular school day program.

b. Mobile Instructional Units ("MIUs")

29. As discussed above, we were unable to find public school space for students in 48 (or 20%) of the sectarian schools. We have ordered MIUs to serve the children in these 48 schools. (A list of the schools is annexed as Exhibit "B.")

30. Based on the number of students in these schools who receive Chapter 1 services, and the types of services provided, we determined that 70 MIUs would be required. The MIUs will be parked on the public streets in proximity to the sectarian schools during the school day.

31. The MIUs have been leased for 6 hours and 20 minutes a day (which is the length of the regular public school day), and we want to maximize their use. Teachers are scheduled to teach five periods a day, pursuant to their collective bargaining agreement, and there are eight teaching periods in the regular school day. Accordingly, after the first teacher has completed five teaching periods, it may be possible to assign the MIUs to an additional sectarian school for a small portion of the school day, at no additional cost.

32. As described in the Chancellor's prior reports to the Court, competitive bid proposals were solicited from private contractors for the leasing of MIUS. We received seven bids by April 14, 1986, the bid opening date.

33. Of these, only two bidders complied with the specifications we had designed. The lowest bidder could only provide 20 MIUS. The second lowest bidder could provide 70 MIUS, but we only needed 50 more. Accordingly, a contract for 20 MIUs has been awarded to the Daily Bus and Truck Rental Group, and a contract for 50 MIUs has been awarded to Ferdinand Arrigoni, Inc. Both

contracts specify that the delivery date is the opening day of school in September 1986.

34. Each contract requires the supplier to custom build the MIUs to our specifications. Each supplier must also provide all necessary cleaning, maintenance, repair, security, insurance and garage services.

35. In addition, the supplier will provide drivers, who will drive the MIUs to the sectarian schools, remain in the MIUs to provide security, and return the MIUs to the garage at the end of the day. Finally, each contract requires the supplier to build and maintain spare MIUs, to be used as replacement vehicles when necessary. Pursuant to a contractual formula, the Arrigoni contract requires 5 spare MIUs and the Daily Bus contract requires 3 spare MIUs.

36. The cost of the MIUs is contractually established on a per diem basis. For a 6 hour and 20 minute day the cost of each MIU supplied by Daily Bus will be five hundred seventy-five dollars (\$575) and the cost of each MIU supplied by Arrigoni will be five hundred ninety-four dollars (\$594).

37. The annual cost of each MIU will depend on the number of days the MIU is operated during the school year, which is not known at this time. We anticipate an annual cost of approximately seven million dollars (\$7,000,000) for the leasing and all related services for 70 MIUs.

38. Although this is a large expenditure, we believe it is reasonable in the circumstances, in which we are seeking to maintain a New York City Chapter 1 program, for both public and non-public school children, which meets

all legal requirements.

39. This expenditure must be viewed in relation to the total Chapter 1 allocation and program. The MIU expenditure constitutes approximately 3.5% of the total Chapter 1 allocation for New York City, which exceeded 212 million dollars in the 1985-86 school year, and which served approximately 196,000 school children during this year. We leased these MIUs to offer equitable services to all sectarian school children in the Chapter 1 program. A failure to make an equitable offer to all the sectarian school children would jeopardize the entire New York City Chapter 1 program. (See the affidavit of Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs in the New York State Education Department, sworn to on July 30, 1985, annexed to the Chancellor's Initial Report, ¶¶ 5, 17, and Exhibits "A", "B" and "D" annexed to the Chancellor's Initial Report.)

40. Finally, the New York State Legislature has passed, and the Governor has signed, an appropriation for funds to local school districts, state-wide, for administrative costs of the Chapter 1 program. An additional authorizing statute must still be enacted before the funds are made available. If the statute is enacted, we anticipate that New York City would receive an allocation that would cover a substantial portion of the cost of the MIUs for the 1986-87 school year. We would certainly welcome these additional funds, but even if they are not allocated, it is appropriate to order these MIUs based on the considerations which determined the September 1986 plan.

C. Neutral Sites

41. The plan for September 1986 does not include

any neutral sites, because we do not anticipate that any neutral sites will be ready for Chapter 1 use by September 1986.

42. As documented in our prior reports to the Court, to date we have found only three appropriate neutral sites: the Bridgefield Civic Center; the Compos Community Center and the Kips Bay Boys Club. These are the only sites we have inspected which satisfied all of the following conditions: the owner is interested in leasing to us; the site is located near a sectarian Chapter 1 school; the space is appropriate for instructional use and the space requires only modest renovations.

43. Lease negotiations have not yet been concluded for any of the three identified neutral sites. It normally takes many months after negotiations are concluded for the lease approval process and the renovations to be completed. Accordingly, none of these three sites will be ready in September 1986, although they may be ready for Chapter 1 use sometime later in the 1986-87 school year.

The Consultation Process with
Sectarian School Officials,
Principals and Parents

44. As described in the Chancellor's prior reports to the Court, over the course of the past year, we have met regularly with sectarian school officials and have also sought information from sectarian school principals and comments from sectarian school parents, concerning the development and implementation of the September 1986 plan. Since the Chancellor's Third Report to the Court, we have continued this consultation process.

45. Over a two week period, commencing on May 5, 1986, each of the principals of the 242 sectarian schools in next year's Chapter 1 program met individually with a member of the Chancellor's staff.

46. In these meetings, we discussed with each principal our proposed Chapter 1 plans for September 1986 for his or her school. Each principal was asked to comment on our proposed plan for his or her school, and the principal's comments were recorded on a form which was then reviewed by the Chancellor's staff. A blank sample of this form, which was developed after consultation with the New York State Education Department, is annexed as Exhibit "C".

47. Almost all principals stated that they did not want their children to attend a Chapter 1 program in a public school. Many principals stated that they would strongly prefer that their children attend a Chapter 1 program in an MIU, rather than in a public school. Many other principals stated that they would rather their children attend a Chapter 1 program in a neutral site, rather than in a public school,

and some of these principals suggested potential neutral sites that are near their schools. As we have informed the principals in writing, we are investigating those proposed sites where the use of neutral space would be reasonable and the proposed site appears to be appropriate for instruction and truly neutral. However, we do not anticipate that any of these proposed neutral sites will be available by September 1986. The individual letters to every sectarian school principal are annexed as Exhibit "D".

48. On May 22, 1986, I addressed a meeting of the non-public school Parents' Advisory Council. This group represents parents of nonpublic school children enrolled in the Chapter 1 program. The questions and comments of the parents who attended this meeting indicated that they were concerned about, and in almost all cases opposed to, sending their children to the public schools for Chapter 1 services. Many parents questioned why we could not continue the program as before, using public school teachers in the sectarian schools. I explained that the Supreme Court had ruled that our present program is unconstitutional.

49. Since April 1986, when the Chancellor asked me to implement the alternative September 1986 plan, I have also attended numerous meetings with sectarian school officials to discuss the possible alternatives for the September 1986 plan, to develop the format for and coordinate the individual interviews which were held with the sectarian school principals in May and to discuss additional types of sites for Chapter 1 services which might be used in the future.

Possible Future Alternatives for
the Provision of Chapter 1 Services
to Sectarian School Children

50. We are also investigating other alternatives for the future provision of Chapter 1 services. We do not anticipate that we will be able to implement any of these alternatives by September 1986, but we anticipate implementing one or more of these alternatives during the course of the 1986-87 school year.

51. First, as described above, we will continue to seek additional neutral space, and will consider proposed neutral sites suggested by the sectarian school principals, in cases where the use of neutral space is reasonable. We are also trying to find apartments, houses and public libraries which could be made suitable for Chapter 1 purposes. Our experience in seeking neutral sites this year has shown that it is very difficult to lease neutral space. Many potential sites would have required extensive renovations to be made code compliant for classroom occupancy, and many owners were simply not interested in leasing their space to the Board of Education.

52. We have also developed a preliminary design and specifications for semi-permanent trailers, which may be cheaper than the MIUs. These trailers would be stationary during the school year, but could be moved during summer vacations. Once the design and specifications are approved as compliant with all applicable codes, statutes and regulations, we will seek bids for a small number of these trailers.

53. If an acceptable bid is received, we plan to place some of these trailers on property leased by the Board

of Education from sectarian schools. The leased property would be near the sectarian school building (most likely in the sectarian school playground or parking lot) and the trailers and the underlying property would be suitably separated from the sectarian school property and would be marked as public property. The New York State Department of Education has taken the position that this arrangement is acceptable, in appropriate cases.

54. We would also place some of these semi-permanent trailers on the curbside near the sectarian schools. This would allow us to determine the feasibility, from a practical standpoint, of using these trailers for Chapter 1 purposes at the same type of location that the MIUs will be placed at (without moving the trailers at night as the MIUs will be moved).

55. We are also investigating the possibility of entering into contracts with independent, private organizations to provide Chapter 1 services and supervision. The services would be provided by a private contractor in the sectarian school. Supervision of the teachers, paraprofessionals, guidance counselors and therapists would also be provided by a private contractor.

56. Our initial plan for the use of an independent contractor would be a small pilot program involving at most a few schools. The United States Department of Education has informed us that the Department has no objection to our establishing this pilot program on a test case basis.

57. The Chancellor will notify both the Court and plaintiffs' counsel concerning our plans regarding: a) the siting of semi-permanent trailers on property leased from the sectarian schools or b) the use of an independent contractor,

as soon as a final decision has been made to implement either of these alternatives.

Conclusion

58. In accordance with the judgment of this Court, filed on September 26, 1985, as affirmed by the United States Court of Appeals for the Second Circuit in an order filed on March 26, 1986, I submit this affidavit as the Board of Education's plan for the Provision of Chapter 1 services as of September 1986.

[Joseph J. Saccente]

Joseph J. Saccente

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Sworn to before
me this 3rd day
of June, 1986

[Catherine Spatafora]
Notary Public

Catherine Spatafora
Notary Public, State of New York
Qualified in Queens County
Commission Expires, May 31, 1988

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #1

Non-Public School	Rooms Needed	# of Day/Week	Matching Public School
Immaculate Conception 419 East 13th Street	1	2	P.S. 61 620 E 12th St.
Mary Help of Christians 435 E. 11th Street	1	3	P.S. 19 185 First Ave.
Our Lady of Sorrows 219 Stanton Street	1	5	P.S. 63 121 E. 3rd St.
St. Brigid 185 E. 7th Street	3	5	P.S. 64 600 E. 6th St.
St. Stanislaus 104 St. Mark's Pl.	1 1	5 2	P.S. 63* 121 E. 3rd St.
Beth Jacobs 142 Broome Street	1	4	P.S. 20 166 Essex St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC
SCHOOLS

June 2, 1986

DISTRICT #2 (1 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Cross 332 W. 43 St.	2	5	P.S. 51 520 W. 45th St.
Our Lady of Good Coun. 33323 E. 91 St.	1 1	5 3	P.S. 151 1763 First Ave.
Sacred Heart of Jesus 456 W. 52 St.	1 1	5 3	P.S. 111 440 W. 53rd St.
St. Catherine of Siena 420 E. 69 Street	1 1	5 3	P.S. 183 419 E. 66th St.
St. Columba 331 W. 25th St.	1 1	5 3	P.S. 11* 320 W. 21 St.
St. Francis De Sales	1 1	5 4	P.S. 198 1700 Third Ave.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. James 37 St. James Pl.	1	1	P.S. 1* 8 Henry St.
St. Joseph 420 E. 87th St.	1 1	5 1	P.S. 190 331 E. 82th St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #2 (2 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Joseph 1 Monroe Street	1 1	5 3	P.S. 126 80 Catherine St.
St. Joseph 111 Washington Pl.	1	3	P.S. 3 490 Hudson St.
St. Patrick 233 Mott Street	4	5	P.S. 42 71 Hestor St.
Transfiguration 29 Mott Street	1 1	5 1	P.S. 1* 8 Henry Street
St. Francis Xavier 126 W. 17th St.	1	2	P.S. 11* 320 W. 21 St.*

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

District #3

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Blessed Sacrament 147 W. 70th Street	1 1	5 3	P.S. 199 270 W. 70th St.
Holy Name of Jesus 202 W. 97 Street	3	5	JHS 118* 154 W. 93 St.
St. Gregory the Great 138 W. 90 St.	1 1	5 1	JHS 118* 154 W. 93 St.
Yeshiva Chofetz Chaim 346 W. 89th St.	1	4 (per session)	P.S. 166 132 W. 89th St

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #4

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Mt. Carmel-Holy Rosary 371 Pleasant Ave.	1 1	5 3	P.S. 7* 150 E. 20th St.
Our Lady Queen of Angels 232 E. 113th Street	1 1	5 1	P.S. 102 315 E. 113th St.
St. Cecilia 220 E. 106 Street	3	5	J.H.S. 117* 240 E. 109th St.
St. Lucy 340 E. 104 Street	1	3	P.S. 121 232 E. 103rd St.
St. Ann 314 E. 110 Street	1 1	5 1	JHS 117 240 E. 109th St.

St. Paul 114 E. 118 Street	1 1	5 2	P.S. 7* 160 E. 120th St.
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* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #5

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Annunciation 461 W. 131 Street	1	4	P.S. 129 425 W. 130th St.
Resurrection 282 W. 151 Street	1	3	P.S. 46* 2987 Eight Ave.
St. Aloysius 223 W. 132 Street	1	4	P.S. 154* 250 W. 127th St.
St. Joseph 168 Morningside Ave.	1	3	P.S. 125* 425 W. 123rd St.
St. Mark the Evangelist 55 West 138 Street	1	5	P.S. 123* 1301 W. 140th St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Corpus Christi 535 W. 121 Street	1	5	P.S. 125* 425 W. 123rd St.
Our Lady of Lourdes 468 W. 143 Street (District 6)	3	5	P.S. 123* 301 W. 140th St.
St. Catherine of Genoa 508 W. 153 Street	1	5	P.S. 46* 2987 Eight Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #7

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Immaculate Conception 378 E. 151 Street	2	5	P.S. 1 335 E. 152nd St.
SS. Peter & Paul 838 Brooke Ave.	1 1	5 3	P.S. 157* 757 Cauldwell Av.
St. Adalbert 419 E. 155 St.	1	2	P.S. 29 758 Courtland Av.
St. Anselm 685 Trinity Ave.	2 1	5 3	P.S. 161 628 Tinton Ave.
St. Jerome 222 Alexander Ave.	2	5	P.S. 154 333 E. 135th St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Luke 608 E. 139 St.	3	5	P.S. 65 141 St. & Cypress Ave.
St. Pius V 413 E. 144 Street	2 1	5 2	JHS 149 360 E. 145th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #8

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Cross 1846 Randall Ave.	2 1	5 3	P.S. 69 560 Theriot Ave.
Holy Family 2169 Blackrock Ave.	1 1	5 3	JHS 125 111 Pugley Ave.
St. Frances de Chantal 2962 Harding Ave.	1 1	5 1	P.S. 72 Dewey & Edison Ave.
St. John Vianney 2141 Seward Ave.	1	5	I.S. 174 456 White Plains Rd.
Greek American Institute 3573 Bruckner Blvd.	1	5	P.S. 71 3040 Roberts Av.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Blessed Sacrament 1160 Beach Ave. (Dist. 12)	1	3	P.S. 100 800 Taylor Av.
St. Athanasius 830 Southern Blvd.	3 1	5 3	P.S. 60 888 Stebbins Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #9

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Christ the King 1345 Grand Concourse	2	5	JHS 117* 1865 Morris Av.
Sacred Heart Middle 1248 Nelson Ave.	2	5	I.S. 82 1700 Macombs Rd.
Sacred Heart Prima 95 W. 168 Street	2 1	5 1	P.S. 126 175 W. 166th St.
St. Angela Merici 226 E. 163	3	5	I.S. 145 1000 Teller Ave.
St. Augustine 1176 Franklin Av.	1	3	P.S. 63 1260 Franklin Av.
St. Joseph 1946 Bathgate Av.	1	2	P.S. 58 E. 176th St. & Washington Ave.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Margaret Mary 121 E. 177 Street	1	4	JHS 117* 1865 Morris Av.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #11

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Rosary 1500 Arnow Ave.	1	4	I.S. 144 2545 Gunther Av.
Immaculate Conception 760 E. Gunhill Road	1 1	5 3	P.S. 89 980 Mace Ave.
Our Lady of Grace 3981 Bronxwood	1	3	P.S. 21 715 E. 225th St.
St. Helena 2050 Benedict Ave.	1	4	JHS 127 1560 Purdy St.
St. Lucy 830 Mace Ave.	1	2	JHS 135 2441 Wallace Ave.
St. Brendan 268 E. 207 St. (Dist. 10)	1 1	5 2	JHS 113 3710 Barnes Ave.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #12

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Anthony 1776 Mansion Street	1	3	I.S. 167 1970 W. Farm Rd.
St. John Chrysostom 1144 Hoe Ave.	2	5	P.S. 150 920 E. 117th St.
St. Thomas Aquinas 1909 Daly Ave.	2	5	P.S. 6 100 E. Tremont Ave.
R.T. Hudson SDA 1122 Forest Ave.	1	2	I.S. 158 800 Home St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #13

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Ft. Green Cath. Vand. Ave. Lafayette & Vand.	1	2	I.S. 113* 300 Adelphi St.
Hanson Place SDA 38 Lafayette Ave.	1	3	I.S. 113* 300 Adelphi St.
Mt. Pisgah Christian 760 Dekalb Ave.	1	2	P.S. 54 195 Sanford St.
Unity Catholic 991 St. John Place (Dist. 17)	1	5	P.S. 56 170 Gates Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #14 (1 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
All Saints Elementary 58 Whipple Street	1	2	P.S. 297 700 Park Ave.
Most Holy Trinity 140 Montrose Ave.	1 1	5 4	P.S. 250 108 Montrose Ave.
Our Saviour 250 Hooper Street	2 1	5 2	P.S. 16 157 Wilson Street
SS. Peter & Paul 288 Berry Street	3	5	P.S. 84 250 Berry St.
St. Stanislaus Kosta 10 Newell Street	1	2	J.H.S. 126* 424 Leonard St

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Vincent de Paul 180 N. 7th Street	1 1	5 2	P.S. 17* 208 N. 5th St.
Bais Yaakov K'Kahl Adas Y. 563 Bedford Ave.	1 1	1 3 P.S.	P.S. 157* 850 Kent Ave.
St. Anthony - St. Alphonsus 725 Leonard Street	3	5	P.S. 31 75 Meserole Ave.
St. Cecilia 1-15 Monitor Street	3 1	5 3	P.S. 110 124 Monitor St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #14 (2 of 3)

Non-Public Schools	Rooms Needed	# of Days/ Week	Matching Public School
St. Frances of Paola 1201 Conselyea Street	1	5	J.H.S. 126* 424 Leonard St.
St. Nicholas Elementary 287 Powers Street	1	5	P.S. 147 325 Bushwick Ave.
Bnos Yaakov Yeshiva 62 Harrison Ave.	1 1	2 2 P.S.	P.S. 380 370 Marcy Ave.
Bnos Yerushalayim 12 Franklin Avenue	1 1	1 2 P.S.	P.S. 157 850 Kent Ave.
Yeshiva Ahavas Israel 6 Lee Avenue	2	4 P.S.	P.S. 157* 850 Kent Ave.

Non-Public Schools	Rooms Needed	# of Days/ Week	Matching Public School
Y. Jesode Hatorah V'etz C. 505 Bedford Avenue	2 1	4 P.S. 2 P.S.	P.S. 157* 850 Kent Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #14 (3 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Y. Kehilath Yakov for Boys 206 Wilson Street	2	4	P.S. 157* 850 Kent Ave.
Yeshiva Mes. Arugath Habosem 171-173 Hooper Street	1	4 P.S.	P.S. 157* 850 Kent Ave.
Brooklyn Temple Elem. 8 Lewis Avenue	1	3	P.S. 59 211 Throop Ave.
Beth Rachel Girls, UTA 227 Marcy Avenue	1	2	P.S. 17* 208 N. 5th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #15 (1 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Name of Jesus 241 Prospect Park West	2 1	5 1	J.H.S. 88* 544 7th Ave.
Immaculate Heart of Mary 3002 Ft. Hamilton Pkwy.	2 1	5 2	J.H.S. 88* 544 7th Ave.
Our Lady of Peace 512 Carroll Street	2 1	5 3	P.S. 32* 317 Hoyt St.
Sacred Heart/St. Stephen 135 Summit Street	2 1	5 1	P.S. 29* 425 Henry St.
St. Agnes 421 Degraw Street	2 1	5 3	P.S. 32* 317 Hoyt St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Augustine - St. Francis Xavier 763 President Street	5	5	P.S. 321 180 7th Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #15 (2 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Saviour Elementary 701 8th Avenue	1	3	P.S. 107 1301 8th Ave.
St. Thomas Aquinas - Holy Family 211 8th Street	3 1	5 2	J.H.S. 51 350 Fifth Ave.
Tomer Dvorah 4500 9th Avenue	1 1	2 2 P.S.	P.S. 131 4305 Ft. Hamilton Pkwy
St. Charles Borromeo 23 Sidney Place	1	3	P.S. 29* 425 Henry St.
St. John the Evang. - Holy Family 259 21st Street	2	5	P.S. 10 511 7th-Ave.
St. Mary Star of the Sea 467 Court Street	1	4	J.H.S. 142 610 Henry St.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Argyrios Fantis Parochial 195 State Street	1	5	P.S. 29* 425 Henry St.
St. Catherine of Alexandria 1053 41st Street	2	5	J.H.S. 136 4004 Fourth Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC
SCHOOLS

June 2, 1986

DISTRICT #16

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Martin de Porres East 180 Bainbridge Street	1	2	P.S. 21 180 Chauncy St.
New Bedford Stuyvesant JHS 82 Lewis Avenue	4	5	J.H.S. 57 125 Stuyvesant Ave.
Our Lady of Bedford Stuyvesant East 80 Lewis Avenue	1 1	5 2	P.S. 304 280 Hart St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT # 18

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Family Flatlands Ave. & E. 98th Street	1	1	J.H.S. 211 Ave. J & E. 100th St.
St. Therese of Lisieux 4410 Avenue D	1	1	J.H.S. 285 5095 Beverly Rd.
Excelsior Elementary 418 E. 45th Street	1	2	J.H.S. 232 905 Winthrop St.
Flatbush Seventh Day 5810 Snyder Avenue	1	2	J.H.S. 252 Lenox Rd. & E. 94th St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #19

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public Schools
Blessed Sacrament 187 Euclid Ave.	2 1	5 3	P.S. 345 111 Berriman St.
St. Fortunata 2635 Linden Blvd.	1	5	P.S. 202* 982 Hegeman Ave.
St. John Cantius Blake Ave. & Vermont St.	1 1	5 2	P.S. 328 330 Alabama Av.
St. John Neuman 237 Jerome Street	3 1	5 2	P.S. 149 700 Sutter Av.
St. Rita 260 Shepherd Ave.	3	5	P.S. 202* 982 Hageman
St. Sylvester 396 Grant Ave.	1	4	P.S. 202 982 Hegeman Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #20 (1 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Holy Spirit 1668 - 46 Street	1	3	P.S. 192* 4715 18th Ave.
Bais Rochel (Boro Park) 5301 14th Ave.	1 1	2 P.S. 4	P.S. 180* 16th Ave. & 57th St.
Bais Yaakov of Brooklyn 1362 - 49 Street	1	2	P.S. 164* 14th Ave. & 42nd St.
Beth Jacob of Boro Park 1371 - 46 Street	1 1	5 3 P.S.	P.S. 164* 14th Ave. & 42nd St.
Bnos Zion of Bobov 5000 - 14th Ave.	1	3	P.S. 164* 14th Ave. & 42nd St.
Bobover Yesh. Bnai Zion 1533 - 48 Street	2	4 P.S.	I.S. 223* 4200 16th Ave.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #20 (2 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Y. Beth Hillel of Krasna 1364 - 42 Street	2 1	4 P.S. 2 P.S.	P.S. 164* 14th Av. and 42nd St.
Yesh. Chatzar Hakodesh 1353 50th Street	1	2 P.S.	P.S. 180* 16th Av. & 57th St.
Yesh. Machzikei Hadas Belz 4107 - 16th Av.	2 1	4 P.S. 1 P.S.	I.S. 223* 4200 16th Av.
Yesh. Ohel Moshe 7914 Bay Parkway	1 1	1 4 P.S.	P.S. 186 7601 19th Av.
Yesh. Rabbi Solomon Kluger 1876 - 50 Street	1 1	4 P.S. 3 P.S.	P.S. 192* 4715 18th Av.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Yes. Tiferes Elimelech 58-01 - 16th Av.	1 1	4 2	P.S. 180* 16th Av. & 57th St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #20 (3 of 3)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Y. Toras Emes Kamenitz 1650 - 56th St.	1 1	3 2 P.S.	P.S. 180* 16th Av. & 57th St.
Yesh. & Yagdil Torah	2	4 P.S.	P.S. 164* 14th Av. & 42nd St.
Y. Yesode Hatorah of Boro P. 1350 50th Street	2	4 P.S.	P.S. 192* 4715 18th Ave.

Yesh. & Mes. Torah Temimah 555 Ocean Parkway (D 22)	2	4 P.S.	JHS 223* 4200 16th Av.
Yesh. Torah Vodaath Elem 452 E. 9th St. (Dist. 22)	2	4 P.S.	P.S. 179 202 Ave. C
Our Lady of Perpetual Help 5902 6th Ave.	2 1	5 2	P.S. 180 16th Ave. & 57th St.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT # 21 (1 of 2)

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Most Precious Blood 133-157 - 27th Av.	1 1	5 3	P.S. 212 87 Bay 49th St.
Our Lady of Grace 385 Av. W	1	5	P.S. 216* 350 Av. X

Our Lady of Solace 2865 W. 19 Street	1 1	5 2	P.S. 90 2840 W. 12th St.
SS. Simon & Jude 294 Av. T.	1 1	5 2	JHS 228 Av. S & W 4th St.
St. Mary Mother of Jesus	1	2	P.S. 128 2075 84th St.
Be'er Hagolah Institute 293 Neptune Av.	2 1	5 2	JHS 303 501 West Av.

* Indicates school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #21 (2 of 2)

Non Public School	Rooms Needed	# of Days/ Week	Matching Public School
Lubavitcher Chabad 841 Ocean Parkway	2 1	4 P.S. 3 P.S.	P.S. 121* 20th Ave. & 53rd St.

Non Public School	Rooms Needed	# of Days/ Week	Matching Public School
Mirrer Yeshiva K'Tanah Elementary 1791 Ocean Parkway	1 1 1	1 4 P.S. 3 P.S.	P.S. 215 Ave. S. & E. 2nd St.
Shulamith for Girls 1277 East 14th Street	1 1	4 3 P.S.	P.S. 99* 1120 E. 10th St.
Yeshiva Ahi Ezer 2433 Ocean Parkway	1 1	2 1 P.S.	P.S. 216* 350 Ave. X
Yeshiva of Flatbush 919 East 10th Street	1 1	4 3 P.S.	P.S. 99* 1120 E. 10th St.
Yeshiva Karlin Stolin 1818 54th Street	2	4 P.S.	P.S. 121* 20th Ave. & 53rd St.
Yeshiva Rabbi Chaim Berlin 1302 Avenue I	2	4 P.S.	P.S. 99* 1120 E. 10th St.

Non Public School	Rooms Needed	# of Days/ Week	Matching Public School
Yeshiva Sharei Zedek of Sea Gate 3801 Nautilus Avenue	1	1	P.S. 329 2929 W. 30th St.

* Indicates a school used more than once.

**MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC
SCHOOLS**

June 2, 1986

DISTRICT #23

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Our Lady of Loretto 2365 Pacific Street	1 1	5 3	P.S. 332 51 Christopher Ave.
Risen Christ Lutheran 250 Blake Avenue	1	2	I.S. 263 210 Chester St.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #27

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Anthony of Padua 125-18 Rockaway Blvd.	1 1	5 1	P.S. 123* 145-01 119th Ave.
St. Clement Pope 120-27 141st Street	2	5	P.S. 123* 145-01 119th Ave.
St. Rose of Lima 154 Beach 84th Street	1 1	5 1	P.S. 42 488 Beach 66th St.

* Indicates a school used more than once.

**MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC
SCHOOLS**

June 2, 1986

DISTRICT #28

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Pius V 105-12 Liverpool Street	2	5	P.S. 50* 143-26 101st Ave.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #29

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Immaculate Conception 179-14 Dalny Road	2 1	5 2	I.S. 238* 88-15 182nd St.
Incarnation 89-15 Francis Lewis Blvd	1	1	P.S. 134 109th Ave. & 203rd St.
Sacred Heart 115-50 221st Street	2 1	5 2	P.S. 147 218-01 116th Ave.
St. Catherine of Sienna 118-34 Riverton Street	1 1	5 3	P.S. 36 187-01 Foch Blvd.
St. Clare 137-25 Brookville Blvd.	1	2	P.S. 156* 229-02 137th Ave.

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
St. Gerard Majella 91st Avenue & 188th Street	1 1	5 3	I.S. 238* 88-15 182nd St.
St. Pius X 147-65 249th St.	1	1	P.S. 138 253rd St. & Weller Ave.
Linden SDA 137-01 228th Street	1	2	P.S. 156* 229-02 137th Ave.
St. Pascal Baylon 112-35 199th Street	2	5	I.S. 192

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #30

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Blessed Sacrament 34-20 94th Street	2 1	5 2	P.S. 127* 98th St. & 25th Av.
St. Gabriel 97th St. & Astoria Blvd.	1 1	5 3	P.S. 127* 98th St. & 25th Av.
St. Mary 10-24 49th Av.	1 1	5 1	P.S. 111 37-15 13th St.
St. Patrick 39-37 28th Street	1 1	5 4	JHS 204 36-41 28th St.
St. Rita 36-14 12th Street	1 1	5 3	P.S. 76 36-36 10th St.

* Indicates a school used more than once.

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #31

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Assumption 10 Kingsley Pl.	1	3	P.S. 16 80 Monroe Av.
Immaculate Conception 104 Gordon St.	1 1	5 1	P.S. 14 100 Tompkins Av.
Our Lady of Mt. Carmel- St. Benedicta 285 Clove Road	1	2	P.S. 19 780 Post Ave.
St. Peter Elementary 300 Richmond Terr.	1	4	P.S. 31 55 Layton Av.
St. Sylvester 884 Targee Street	1	4	P.S. 57 140 Palma Drive

MATCHING OF NON-PUBLIC SCHOOLS TO PUBLIC SCHOOLS

June 2, 1986

DISTRICT #32

Non-Public School	Rooms Needed	# of Days/ Week	Matching Public School
Our Lady of Lourdes 2-12 Aberdeen Street	2	5	P.S. 384 242 Carper St.
St. Brigid 438 Grove Street	1 1	5 1	JHS 291 231 Palmeto St.
St. Frances Cabrini 181 Suydam St.	3	5	I.S. 111 35 Starr St.
Pilgrim Christian Acad. 600 Central Av.	1	3	JHS 296 120 Covert St.
St. Elizabeth Seton 751 Knickerbocker Ave.	4 1	5 4	P.S. 106 1314 Putnam Ave.

MATCHING OF NON-PUBLIC HIGH SCHOOLS TO PUBLIC HIGH SCHOOLS

June 2, 1986

DISTRICT - HIGH SCHOOLS

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
LaSalle Academy 44 East 2nd Street N.Y. N.Y. 10013	1	5	Wash. Irving 40 Irving Pl NYC 10003
Cathedral H.S. 360 E. 56 Street N.Y. N.Y. 10022	3	5	H.S. of Art Design 1075 2nd Ave NYC 10022
St. Jean Baptiste 73 E. 75th Street N.Y. N.Y. 10021	2	5	Julia Richman 317 E. 67 St. NYC 10021

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
St. Michael High 425 West 33rd St. N.Y. N.Y. 10017	1	5	H.S. for Humanities 351 W. 18 NYC 10001
Rice High 74 W 124th St. N.Y. N.Y. 10027	4	5	H.S. of Science & Mat - 116 St. & FDR Drive NYC 10029
Cardinal Hayes 650 Grand Concourse Bronx, NY 10451	3	5	Alfred E. Smith 333 E. 151 St. Bronx, 10451

June 2, 1986

DISTRICT - HIGH SCHOOLS

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
St. Pius V. High 500 Courtland Ave. Bronx, N.Y. 10451	1	2	Samuel Gompers H.S. 455 Southern Blvd. Bronx, 10455
Msgr. Scanlan HS 915 Hutchinson Rv. Pk. Bronx, NY 10465	1	2	Herbert Lehman 3000 E. Tremont Ave. Bronx, 10461
Aquinas HS E. 182nd St. Bronx, NY	2	5	Wm. Howard Taft 240 E. 172 St. Bronx, 10457
St. Nicholas of Tolentine HS 2336 Andrews Ave Bronx, NY 10468	2	5	Theodore Roosevelt 500 East Fordham Rd. Bronx, 10458

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
Bishop Loughlin 357 Clermont Ave. Brooklyn, NY	3	5	Bklyn Tech 29 Ft. Greene Place Bklyn, 11217
St. Joseph High 80 Willoughby St. Brooklyn, NY 11201	1 1	5 3	Bklyn Tech 29 Ft. Greene Place Bklyn, 11217

MATCHING OF NON-PUBLIC HIGH SCHOOLS TO PUBLIC HIGH SCHOOLS

June 2, 1986

DISTRICT - HIGH SCHOOLS

Non-Public High School	Rooms Needed	# of Days Per Week	Matching Public High School
Bishop Ford-Central 500 19th St. Brooklyn, NY 11215	2	5	John Jay 237 7th Ave. Bklyn, 11215
Beth Rivkah High 310 Crown St. Brooklyn, NY 11225	1	1	Geo. Wingate 600 Kingston Ave. Bklyn, 11203
Catherine McAuley HS 710 E. 37th St. Brooklyn, NY	1 1	5 2	Tilden HS 5800 Tilden Ave. Bklyn, 11203

Non-Public Schools Without A Matched Public School

June 2, 1986

MANHATTAN

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
6	Good Shepherd	2	5
	620 Isham Street	1	3
	Incarnation	3	5
	570 W. 175th Street		
	Our Lady Queen of Martyrs	2	5
	71 Arden Street	1	2
	St. Elizabeth	2	5
	612 W. 187th Street		
	St. Jude	2	5
	433 W. 204th Street		
	St. Rose of Lima	1	5
	517 W. 164th Street	1	3
	St. Spyridon Parochial	1	5
	120 Wadsworth Avenue	1	1

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EXHIBIT B (5 Pages)

Non-Public Schools Without A Matched Public School

June 2, 1986

BRONX

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
10	Our Lady of Angels	1	5
	2865 Claflin Ave.	1	3
	Our Lady of Mt. Carmel	5	5
	2467 Bathgate Avenue		
	St. Ann	1	4
	3511 Brainbridge Avenue		
	St. John	2	5
	3030 Godwin Terrace		
	St. Nicholas of Tolentine	2	5
	2335 University Avenue	1	3
	St. Philip Neri	1	3
	3031 Grand Concourse		
	Visitation	1	1

171 W. 239th Street

Holy Spirit	4	5
1960 University Avenue		

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
	Our Lady of Mercy	2	5
	2512 Marion Ave.	1	3
	Our Lady of Refuge	2	5
	2708 Briggs Avenue	1	1
	St. Martin of Tours	1	5
	695 E. 182 Street	1	1
	St. Simon Stock	3	5
	2195 Valentine Avenue		
11	S.S. Philip & James	1	4
	1160 E. 213th St.		
	St. Dominic	1	4
	1684 White Plains Rd.		

Non-Public Schools Without A Matched Public School

June 2, 1986

BROOKLYN

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
15	St. Agatha	2	5
	736 48th Street	1	1
	St. Michael	3	5
	4222 4th Avenue	1	2
17	Holy Cross	1	2
	2520 Church Avenue		
	St. Francis of Assisi	1	5
	400 Lincoln Road	1	2
	Beth Rivkah for Girls	1	4
	310 Crown Street		
	Beth Rivkah for Girls	1	1
	2270 Church Avenue		
	St. Mark's Day	1	3
	1346 President Street		
	Mt. Moriah	1	1
	1149 Eastern Parkway		

Non-Public Schools Without A Matched Public School

June 2, 1986

BROOKLYN - continued

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
	St. Johns Elementary 19 Winthrop Street	1	4
	Holy Spirit 5670 Sterling Place	4	5
18	St. Catherine of Genoa 870 Albany Avenue	1	2
22	Holy Innocents 249 E. 17th Street	2	5
	Our Lady of Refuge 1087 Ocean Avenue	1	5
	St. Jerome 465 E. 29th Street	2 1	5 3
	St. Rose of Lima 259 Parkville Ave.	1 1	5 2
	St. Vincent Ferrer 860 East 38th St.	1	2

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Non-Public Schools Without A Matched Public School

June 2, 1986

QUEENS

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
24	Our Lady of Sorrows 35-34 105th Street	2	5
	St. Aloysius 360 Seneca Avenue	2 1	5 1
	St. Leo 104-19 49th Avenue	1	4
	School of the Trans 98-07 38th Avenue	1	5
27	St. Mary Star of the Sea 595 Beach 19th Street	1	5
	Torah Academy for Girls 444 Beach 6th St.	1 1	1 2
	Yeshiva Darchei Torah 257 Beach 17th St.	1	2

28	Our Lady of the Cenacle	1	5
	87-25 136th St.	1	1

Non-Public Schools Without A Matched Public School

June 2, 1986

QUEENS - continued

<u>District</u>	<u>Non-Public School</u>	<u># of Rooms</u>	<u># of Day/Week</u>
28	Presentation of BVM 88-13 Parsons Blvd.	3	5
	St. Teresa of Avila 109-55 128th St.	1 1	5 3
30	Hebrew Academy of W. Queens 34-25 82nd Street	1 1	5 1

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BUREAU OF FINANCIAL AUDIT
BUREAU OF MANAGEMENT AUDIT
161 WILLIAM STREET
NEW YORK, N.Y. 10038

HARRISON J. GOLDIN
COMPTROLLER

ROGER D. LIWER
DIRECTOR OF AUDITS

April 26, 1988

Mr. Steven Schwager
Chief, School Business Executive
NYC Board of Education
110 Livingston Street
Brooklyn, New York 11201

Dear Mr. Schwager:

As you know, my office has been auditing the award by the Board of Education of a contract for mobile instructional units (MIUs) to the New York Bus Company. My staff had an exit conference with you and your staff on April 13, 1988 to discuss the audit findings and recommendations. At that conference you were informed of problems surrounding the award of the MIU contract. A

formal report of the audit findings and recommendations will be forwarded to the Board in the near future. The report will incorporate any relevant comments and additional information received at the exit conference. However, I would like to document some of the audit's preliminary findings at this time and to emphasize the need for the Board to act expeditiously on the audit's principal recommendation; that recommendation is that the current contract for MIUs not be renewed and that the contractor be advised of this action before April 30, 1988.

In essence, the audit found that the Board's acquisition of mobile instructional units was the end-product of a series of questionable decisions which resulted in the award of the entire MIU contract to the highest bidder.

At the outset, the Board did not decide whether it needed a stationary, trailer-like limit or a mobile vehicle type unit. Instead, it tried to combine elements of both into one unit. This resulted in inconsistent and conflicting design requirements, reduced competition and significantly higher unit costs.

The Board believed "time was of the essence" in acquiring MIUs, yet it did not procure standard, widely available vehicles - the quickest acquisition method. Instead, it designed and sought a custom vehicle - the longest acquisition method. The time needed to build the custom vehicle put the Board in a position where it could not correct deficiencies in its acquisition process or in the vehicles being built and still meet a court-imposed deadline for implementation.

Moreover, the Board never decided whether it was satisfied with its own design or wanted a design from an

outside vendor. This led to its issuing a bid proposal which combined elements of both a Request for Bid, which is commonly used to procure standard, off-the-shelf items, and a Request for Proposal, generally used to procure unique items. The Board's use of an RFB format, ostensibly to save time, was inconsistent with its decision to design and require a unique vehicle.

The bid proposal included a requirements contract (RC) clause. The RC clause stipulated that the Board would only pay for the vehicles used on any one day, even though the contract required the availability of 70 MIUs. If the Board wanted only 40 MIUs in service on one day, vendors would not be paid for the 30 not used. This clause caused a number of interested companies to decline to bid. The Board should have expected that few companies would expend a large capital outlay for a unique vehicle without some assurance of a financial return. In addition, the Board required a prototype, the expense of which again prevented some interested companies from bidding. In any event, the Board never inspected a working prototype of the contract winner's vehicle.

New York Bus has the entire current contract. Originally Daily Bus was to furnish twenty of the MIUs; it was later disqualified. The Board rejected a lower bid from Bernard Montgomery Co. on the highly technical ground of missing shop drawings, even though Montgomery submitted the Board's own drawings as its design and committed to providing detailed drawings within one week. In fact even Daily Bus' drawings were found inadequate but that company was given an extra week to correct them.

Montgomery's bid was \$139.00 per day less than that of New York Bus. The Board would have saved \$1.25

million over the 5-year contract had Montgomery been awarded a contract for the 10 MIUs on which it bid.

The New York Bus vehicle is unsafe. The polyurethane foam used in the vehicle, though it meets the Board's flammability specifications, emits a toxic gas when it burns. A protruding wheel housing in the aisle is a safety hazard. The exterior steps lack a handrail called for in the specifications and a stepwell cover must be manually removed to provide access to the steps. This could cause a serious delay in evacuating students during an emergency.

The audit recommends that the contract with New York Bus not be renewed for school year 1988-89, and that the Board re-bid for mobile units and/or stationary trailers, as suits its needs. The rebid specifications should clearly describe the basic standards for MIUs as established by the State Department of Education and include only those standards from City regulations which are truly relevant. The re-bid should be open to vendors with standard units and should not exclude the current contract holder or previous bidders, if their products are judged safe and can be available for the next school year.

The Board is contractually obligated to give New York Bus four months notice of non-renewal; April 30, 1988 is the deadline for this notice for the 1988-89 school year. Between April 30 and the start of the school year on September 1, with due diligence on your staff's part, much less costly alternatives to the current RC with New York Bus can be found.

I estimate that the dollar savings to New York City from re-bidding to MIUs and/or trailers would be approximately \$2.9 million per year. This would result in

nearly \$9 million saved over the life of the remaining three years of the New York Bus contract.

New York City is one of only two jurisdictions, San Francisco being the other, that uses uniquely designed, high cost MIUs. All other jurisdictions surveyed by my staff use much less expensive alternatives, as follows:

COMPARATIVE COST ANALYSIS OF STANDARD AND CUSTOM-BUILT MOBILE INSTRUCTIONAL UNITS

<u>City</u>	<u>Cost Per Year Per Unit to Lease</u>	<u>Student Capacity</u>
<u>Standard Unit</u>		
Buffalo	\$18,106	9
East Ramapo, N.Y.*	19,995	8
Syracuse	17,000	12
Jacksonville, Fla.*	44,450	8
Yonkers	15,269**	12
Nyack	17,159	8
Rochester	10,900	8
<u>Custom Unit</u>		
New York City	\$106,920	11

* Cost includes: drivers, insurance, gas, maintenance (in Jacksonville the teachers are also included.)

** Average cost over 3 years (1st year @ \$19,000, 2nd @ \$16,888, 3rd year @ \$10,000).

Other jurisdictions, including Philadelphia, Pittsburgh, Detroit and Denver, purchased standard MIUs and trailers at prices ranging from \$28,000 to \$62,000, all less costly than the Board's yearly lease costs. San Francisco also purchased its MIUs, buying six standard vehicles at \$45,000 each and three Custom designed vehicles for \$62,000 each.

In order to determine whether other alternatives are available, my staff contacted 20 vendors in the Northeast region. Fourteen of the vendors can supply MIUs or trailers with less than four months lead time, as follows:

<u>Company</u>	<u>Number of Mobile Units</u>	<u>Number of Stationary Units</u>
Farber East	70	0
Ress Company	70	128
Education-in-Roads	70	128
Vehicle Modification	50	128
Ranger Company	40	120
Wolfington	5	0
Gelco Space	0	70
ABC Trailer	0	128
A to Z Equipment	0	170
Modular Building	0	128
Modular Systems	0	128
Zoubek Trailer	0	128
Acorn Equipment	0	128
Scotsman Company	0	128
Totals	305	1,412

Prices quoted by these vendors ranged from \$12,000 to \$24,000 a year for leasing one MIU, not including a driver, and from \$3,200 to \$7,200 a year for leasing one trailer. Purchase prices ranged from \$40,000 to \$90,000 per MIU and from \$9,000 to \$70,000 per trailer.

All fourteen vendors expressed interest in bidding on a contract for the 1988-89 school year. The six firms offering standard MIUs currently provide MIUs to other cities.

I am attaching a copy of the Board's resolution of award to New York Bus. As you can see, it allows you legally to act as I recommend.

Please feel free to call me if you need further information or there is some way in which I can be helpful.

Sincerely,

Roger Liwer

cc: Harrison J. Goldin, Comptroller
Robert F. Wagner, President, NYC Board of Education
Richard R. Green, Chancellor, NYC Board of Education
Paul Dickstein, Director, OMB
Barbara Gunn, Director, Office of Operations
Don McCabe, Audit Coordinator, OMB
Dorothy Prager, Assistant Director, Office of Operations
James Coney, Auditor General, NYC Board of
Education

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing affirmation was served by fax on December 27, 1995, and by Federal Express on December 28, 1995, on each of the following:

Marilyn Richter, Esq.
Assistant Corporation Counsel
100 Church Street, Room 6-C-34
New York, NY 10007

W. Scott Simpson, Esq.
Trial Attorney
Civil Division, Room 986
Department of Justice
901 E Street, N.W.
Washington, DC 20044

and

Kevin T. Baine. Esq.
Williams & Connolly
725 Twelfth Street, N.W.
Washington, DC 20005

Dated: December 28, 1995

[Stanley Geller]
Stanley Geller

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL
A. SCHWARTZ, ROBERT H.
SIDE and ALLEN H. ZELON,
Plaintiffs,

**NOTICE OF MOTION
BY DEFENDANT-
INTERVENORS FOR
RELIEF FROM
JUDGMENT**

78 CV-1750

- against -

SECRETARY, UNITED STATES DEPARTMENT
OF EDUCATION, CHANCELLOR OF THE
BOARD OF EDUCATION OF THE CITY
OF NEW YORK and BOARD OF EDUCATION OF THE
CITY SCHOOL DISTRICT OF THE CITY
OF NEW YORK,

Defendants.

and

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

PLEASE TAKE NOTICE that, upon the pleadings and proceedings herein, Defendant-Intervenors Rachel Agostini, et al., will move this Court, on February 16, 1996, at the United States Courthouse, for the Eastern District Court of New York, located at 225 Cadman Plaza East, Brooklyn, New York, for an order pursuant to Rule 60 of

the Federal Rules of Civil Procedure, granting relief from this Court's Judgment, dated September 26, 1985, and granting such other relief as to this Court seems just and proper.

Dated: New York, New York
December 19, 1995

WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, DC 20005
(202) 434-5000

By: [Kevin T. Baine]
Kevin T. Baine (KB 0710)

TO:

Stanley Geller
Counsel for Plaintiffs
750 Lexington Avenue
New York, NY 10022

W. Scott Simpson
Counsel for Defendant
United States Secretary of Education
U.S. Department of Justice
Civil Division - Room 986
Federal Programs Branch
P.O. Box 883
Washington, DC 20044

Paul A. Crotty
Corporation Counsel of the
City of New York
Attorney for Defendant Chancellor
100 Church Street
New York, NY 10007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, FLORENCE FLAST,
HELEN HENKIN, HAZEL SMITH, DENISE
KROUSER, and CHRISTINA WALKER,

DECLARATION

88 CIV. 96 (JG)

Plaintiffs,

-against-

SECRETARY, UNITED STATES DEPARTMENT
OF EDUCATIONAL; COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK;
and CHANCELLOR and BOARD OF EDUCATION
OF THE CITY OF NEW YORK,

Defendants,

-and-

JUAN B. COLON, LESLIE GREATHEART, LINDA
WALLACE, CATHERINE AFFRONTI, and ANNIE
MORALES RIVERA,

Defendant-Intervenors,

-and-

LEAH SAKS and BATYA TRAVIS,

Defendant-Intervenors.

MARGARET O. WEISS, declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. I am the Director of the Bureau of Nonpublic School Reimbursable Services of the Board of Education of the City School District of the City of New York. I am responsible for implementing various federal programs which provide instructional and support services to students who attend private schools within New York City. One of these federal programs is Chapter 1 of Title I of the federal Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 2701, et seq. ("Chapter 1").

2. I have been an educator for over 31 years, and have worked in remedial education, as a teacher, supervisor and administrator, for over 27 years. I began my career as a third grade teacher in 1963 at the Sacred Heart Elementary School in Yonkers, New York. In 1965 I began working for the Board of Education of the City School District of the City of New York ("Board" or "Board of Education"). From 1965 to 1967 I taught English and from 1967 to 1972 I taught corrective (i.e., remedial) reading in Junior High School 149 in the Bronx.

3. In 1972 I became a field supervisor for corrective reading for the Chapter 1 (then called Title I) program for the Bureau of Nonpublic School Reimbursable Services ("the Bureau") and have continued to work in the Bureau to the present date. As a field supervisor, I provided on-site training and supervision for over 50 corrective reading teachers each year. In 1974 I became the

coordinator of the Chapter 1 Reading Skills Center program. In this position, I was responsible for implementing the Reading Skills Center program (which serves severely disabled readers), training and supervising the entire teaching and administrative staff of the program and developing courses of instruction for over 400 children. In 1979 I became Assistant Director of the Bureau, and in 1985 I became Director of the Bureau.

4. I hold a Masters of Science in Education and have completed an additional 30 graduate credits in School Supervision and Administration. I hold two professional licenses and two professional certifications from the New York State Education Department. I am licensed by the State as a common branches (i.e., elementary school) teacher and as a reading teacher, and hold certifications as a School Administrator and Supervisor and as a School District Administrator. I also hold four professional licenses from the Board of Education. I am licensed as a teacher of junior high school English and am licensed as an Education Administrator, senior level, in three separate license areas. I submit this declaration in support of the governmental defendants, motion for partial summary judgment.

Brief Overview of the Chapter 1 Program

5. Chapter 1 was first enacted in 1965. The statute provides federal funds for remedial, supplementary education and support services for elementary and secondary school students. To be eligible, a student must have below grade level educational achievement in reading and/or mathematics and reside within the attendance boundaries of a participating public school located in a low income area. (20 U.S.C. §§ 2721(a), 2723(a); 34 C.F.R. § 200.6(c).)

6. The statute has always provided that both public school and private school students are eligible for Chapter 1 services. Implementing regulations promulgated by the United States Department of Education ("DOE") required that private school students receive services that are "comparable" to those provided to public school students.

7. The original requirement that Chapter 1 services provided to public and private schoolchildren be "comparable, " has been expressed in more recent statutory enactments and regulations as a requirement that there be "equitable" participation of eligible students in the Chapter 1 program, without regard to whether they attend public or private schools. (20 U.S.C. § 2727(a), (b)(2); 34 C.F.R. § 200.50(a)(1).) However, the implementing regulations make clear that the requirements of comparability and equitability are essentially the same. (34 C.F.R. §§ 76.654(a), 200.71(b).)

8. Pursuant to the statute, Chapter 1 services are normally implemented by a local educational agency ("LEA"), under the supervision of a state educational agency ("SEA"). (20 U.S.C. §§ 2722(b).)

9. In New York State, the New York State Education Department ("SED") is the SEA. Pursuant to state law, the entire City of New York is one City school district, and the Board of Education is the policy-making body for the City of New York School District. (New York Education Law §§ 2590, 2590-b.1(a), 2590-g.) Accordingly, in New York City the Board of Education is the LEA.

10. It should be noted that the City is also subdivided into thirty-two community school districts, each of which has a community school board. A variety of

functions are delegated to the community school boards by the Board of Education. (New York Education Law §§ 2564, 2590, et seq.) A few of the community school districts administer a portion of the Chapter 1 funds that are allocated to serve the private school students in their districts. However, the Chancellor of the Board of Education, through my Bureau, administers the vast majority of the Chapter 1 funds that are allocated to private school students in New York City. Accordingly, except as otherwise noted, the numbers and other details provided herein refer to the Chapter 1 program for private school students administered by the Chancellor of the Board of Education and not by the community school districts.

11. By agreement of the parties, most of defendants' responses to plaintiffs' voluminous discovery requests were limited to the five year period beginning with the 1986-87 school year and ending with the 1990-1991 school year. Most of the data presented here accordingly concerns this five year period, which was the initial five-year implementation period of the program challenged in this case. However, the program has continued to the present and remains substantially similar to the program implemented during the initial five year period. To show this on-going substantial similarity, statistics are also presented for school year 1993-94, which is the most recent year for which complete statistics are available, since the statistics are fully collected and collated after the end of the school year.

12. The Board of Education is the largest LEA in the nation, and our Chapter 1 program is the largest in the nation. During the five school years beginning in 1986-87 and ending in 1990-91, the number of students served in the Chapter 1 program was: 1986-87 -- 152,193 public school

students and 10,737 private school students, for a total of 162,930 students; 1987-88 -- 150,458 public school students and 11,618 private school students, for a total of 162,076 students; 1988-89 -- 175,348 public school students and 13,368 private school students, for a total of 188,716 students; 1989-90 -- 191,798 public school students and 16,495 private school students, for a total of 208,293 students and 1990-91 -- 222,775 public school students and 18,120 private school students, for a total of 240,895 students. As federal funding for the program has increased, the program has continued to grow. In 1993-94, the program served 237,200 public school students and 21,897 private school students for a total of 259,097 students.

13. In this case, plaintiffs challenge the methods of delivering Chapter 1 services established to comply with the decision in Aguilar v. Felton, 473 U.S. 402 (1985) ("Aguilar"), which applies to students who attend religious schools. Approximately 99% of the private school students in our Chapter 1 program are affected by Aguilar. During the 1986-87 school year, the Board provided Chapter 1 services to 10,661 students from 141 schools affected by Aguilar. The figures in the following years were: in 1987-88, 11,542 students from 153 schools; in 1988-89, 13,270 students from 168 schools; in 1989-90, 16,371 students from 209 schools and in 1990-91 18,018 students from 242 schools. In 1993-94, there were 21,795 students from 237 schools affected by Aguilar.

Chapter 1 Services for Private Schoolchildren before the Aguilar Decision

14. The basic educational composition of Chapter 1 services for private school students, as provided by the Board of Education, has remained essentially unchanged,

from Chapter 1's inception in 1965 until today. Only secular, remedial instruction is provided. Instruction is given in three basic areas -- reading, mathematics and English as a Second Language.

15. In addition, the program provides clinical and guidance support services for eligible children who have emotional or family problems which interfere with their academic performance. The clinical services are provided by social workers and psychologists, and the guidance services by guidance counselors.

16. These same basic services have been provided over the three decades that the program has been in existence. These services have always been designed to supplement and not supplant the private schoolchildren's regular classroom instruction. As discussed below, what has changed over the years has been the methods by which the services have been delivered; the nature of the services provided has remained essentially unchanged.

17. The Board provides Chapter 1 services only to eligible students who attend private schools; it does not provide services to the private schools, nor to the general student populations of these schools.

18. When the program began, in 1965, the Board of Education provided Chapter 1 services to private school students "after school," that is, the services were provided after the students, regular school day was completed. However, it was quickly concluded that the after school services for private school students were not as effective as, and therefore not comparable to, the Chapter 1 services for public school students, which were provided during the regular school day. Both the students and teachers were

tired. In addition, parents had serious concerns about the younger children having to get home in the dark during the winter months, and older children had scheduling conflicts created by jobs and other activities. (Exhibit "3" in support of Plaintiffs' Motion for Summary Judgment, Affidavit Setting Forth the Chancellor's Fourth Bi-Monthly Report which Describes the Alternative Plan for September 1986 (hereafter "Pls. Exhibit 3"), ¶¶ 17, 18).

19. The Board of Education consulted with other LEAs around the country, and learned that other school districts were experiencing similar difficulties with after school Chapter 1 programs. Indeed, one district court subsequently found that an after school Chapter 1 program for private school students was not comparable to the regular school day program for public school students. Based on our own experience, and the reported experience of other school districts, the Board of Education concluded that Chapter 1 services for private schoolchildren should be provided during the regular school day, to ensure that they would be comparable to the regular school day Chapter 1 services for public schoolchildren.

20. Accordingly, after the first year of the program, the Board provided Chapter 1 services to all private schoolchildren during the course of their regular school day, by sending its teachers, guidance counselors, and other professional and instructional employees into classrooms in the private schools (including the religious schools). These classrooms were designated as Board of Education Chapter 1 rooms and used exclusively for the Chapter 1 program.

21. The Board's program was not atypical; beginning in 1965 or soon thereafter, throughout New York

State, and upon information and belief, throughout the nation, Chapter 1 services for children attending religiously-affiliated schools were largely provided by publicly employed teachers and other professionals inside the religious schools. (Letter dated July 12, 1985 from Gordon Ambach, Commissioner of SED, to William Bennett, Secretary of DOE, annexed hereto as Exhibit "A:")

22. On July 1, 1985, in Aguilar v. Felton, 473 U.S. 402 ("Aguilar"), the United States Supreme Court determined that it was a violation of the Establishment Clause of the First Amendment for Board of Education teachers, guidance counselors, and other professional employers to provide Chapter 1 services (other than diagnostic services) inside the religious schools.

Developing Alternative Service Delivery Methods After Aguilar

23. During the 1984-85 school year, the Board provided Chapter 1 services to 172,263 public school students and 21,958 private school students, for a total of 194,221 students. The 21,958 students attended 253 private schools; of these, 252 schools with 21,906 participating students were affected by Aguilar. This meant that new methods of delivering Chapter 1 services had to be devised for these nearly 22,000 private schoolchildren. (As used hereafter in this declaration, the term "private school" refers to those schools whose students' receipt of Chapter 1 services is affected by Aguilar.)

24. Faced with the impossible task of creating and implementing these alternative service delivery methods in the two months before the start of the school year, the Board sought a stay of the judgment. In September 1985,

the district court granted the application and stayed its judgment until the beginning of the 1986-87 school year, to give the Board an opportunity to develop alternative means of delivering Chapter 1 services to private school students. The district court's judgment was subsequently affirmed by the Second Circuit. (Judgment, Betty-Louise Felton, et al. v. Secretary, United States Department of Education, et al., Civil Action No. 78 CV 1750 (ERN), slip op. at 3-4 (Sep. 26, 1985), aff'd., 787 F.2d 35 (2d Cir. 1986).) As a result of the stay, which allowed a continuation of the pre-Aguilar program, the number of private school students that were served under Chapter 1 in the 1985-86 school year did not differ significantly from the number served during 1984-85.

25. By memorandum dated July 22, 1985, SED identified four possible alternatives to face-to-face instruction in the schools, for the delivery of Chapter 1 services to private schoolchildren. These four suggested alternative methods for the provision of Chapter 1 services were: 1) in public schools; 2) in neutral sites; 3) in mobile or portable vans equipped as classrooms or 4) through instructional technology. (Memorandum dated July 22, 1985 from Robert D. Stone, General Counsel of SED to District Superintendents, etc., annexed hereto as Exhibit "B").

26. These four alternative delivery methods suggested by SED, are the four delivery methods which the Board has used in response to Aguilar ("post-Aguilar delivery methods"). For purposes of this declaration, the four methods are referred to as: (1) "public school sites"; (2) "MIUs," which are mobile instructional units; (3) "leased sites," which are sites leased by the Board of Education from private entities and (4) "CAI," which is "computer-assisted instruction."

27. The Board has used public school sites, leased sites and MIUs since the 1986-87 school year, when post-Aguilar delivery methods were first implemented. The Board began using CAI in the 1987-88 school year.

28. A short summary of how these post-Aguilar delivery methods were developed will illustrate some of the educational, logistical, financial and legal considerations and constraints which affected the delivery of Chapter 1 services to religious school children after Aguilar.

29. In terms of both educational and cost effectiveness, providing Chapter 1 services to students inside their own schools, is preferable to using the post-Aguilar delivery methods. As Judge Friendly observed in the Aguilar litigation, the alternatives "are almost certain to be less effective, more costly, or both." Felton v. Secretary, U.S. Dep't. of Educ., 739 F.2d 48, 71 (2d Cir. 1984).

30. Of greatest concern is the time spent by students in moving between their regular classroom and their Chapter 1 site. This is time lost from their regular classroom instruction and is especially serious for Chapter 1 students, since they are the students who are most in need of instruction. The public school site and leased site alternatives often entail significant travel time.

31. Additional instructional time loss and disruption is caused for both the Chapter 1 students and their regular school classmates because Chapter 1 students have to leave their school buildings to receive services at the public school sites, leased sites and MIUs, and therefore have to put on and remove outer garments. This is not a trivial disruption, since most of the Chapter 1 private school students are in the elementary school grades, and this task is

often a major undertaking for young children in the winter.

32. Another consideration is safety. Most of the private schools are located in low income neighborhoods, as are most of the alternative Chapter 1 sites. Many of these neighborhoods have high rates of violent crime. An MIU parked on the street in a high-crime area is more exposed and not as secure as a school building. Walking or even driving children through high-crime areas raises safety considerations. In fact, since the post-Aguilar delivery methods were instituted, a few incidents have occurred which were upsetting to the students, but fortunately resulted in no harm. There was a sniper outside one school when the students were scheduled to be leaving, gangs have threatened some students, and drug dealing has occurred in the vicinity of students. The Board has considered the levels of violence and crime in particular neighborhoods in determining the appropriate method of service delivery for students of a particular school.

33. CAI is interactive computer technology. Children work at computers installed in their regular private school. To comply with Aguilar, there is no teacher present. The student's computer work is monitored electronically by a Board of Education teacher who is located in a Board office in Brooklyn. The teacher can electronically adjust the computer lessons based on the student's progress, but there is no face-to-face interaction.

34. The CAI alternative avoids the instructional time loss, disruption and safety concerns created by the off-site post-Aguilar delivery methods discussed above. However, while CAI has educational value, it is not as educationally effective as direct face-to-face interaction between student and teacher. Although as a group, the

Chapter 1 private school students who receive only CAI instruction do meet SED's educational gain standards for the Chapter 1 program, they do not perform as well overall as the students who receive face-to-face instruction.

35. Finally, there are financial concerns. Each of the alternative delivery methods entails costs which were not incurred under the pre-Aguilar in-school teaching method.

36. As discussed above, the Chapter 1 statute and regulations require that the services provided to private and public schoolchildren be "equitable." In August 1985, DOE issued a written Guidance on Aguilar v. Felton and Chapter 1 (a copy of the Guidance is annexed to the Declaration of Thomas Fagan as Exhibit B.) In question and answer number 4, the federal government stated that an LEA's Chapter 1 application could not be approved, and Chapter 1 funds could not be expended, unless the LEA's Chapter 1 program provided for equitable services to private school children. Thus, the Board was legitimately concerned that if its post-Aguilar Chapter 1 services for private schoolchildren were not equitable, its entire Chapter 1 program would be jeopardized. The Chapter 1 program at that time served over 170,000 public schoolchildren in New York City.

37. In light of the Board's prior experience that after school Chapter 1 programs were not as educationally effective as programs held during the regular school day, and the Board's continuing provision of Chapter 1 services to public schoolchildren during the regular school day, it was determined that an after school program for private schoolchildren raised serious legal concerns about equitability. (Pls. Exhibit 3, ¶¶ 13-19)

Public School Sites

38. A public school site is a room or rooms in a public school that are used to provide Chapter 1 services for private schoolchildren. The rooms may be located anywhere in the building; there are no requirements that the Chapter 1 rooms be together in one wing or area, and there are no doors or other physical structures erected between Chapter 1 and other rooms. Indeed, some rooms which are not used the entire day for Chapter 1 instruction, are used for other purposes by the public school when the private school students' Chapter 1 classes are not in progress. There are no separate entrances or hallways used exclusively by the private school students.

39. Obtaining public school sites for use during the regular school day is difficult, because of lack of space in many public schools, and the educational and logistical problems created by transporting children to and from a public school site. In 1985-86, overcrowding was so severe in some public schools, that certain public schools were busing their own students to different schools for the entire school day. As discussed further below, the space shortage in public schools has become far worse since 1986.

40. In addition, as discussed above, the use of public school sites creates a loss of instructional time, which is a serious concern for these students. The Board therefore sought to minimize travel time, and established a maximum one way vehicular travel time between the two schools of ten minutes. In New York City, travel time is a function of both distance and traffic conditions, although as a general rule, the longer the distance the longer the travel time. The necessary limitation on travel time further restricts the availability of appropriate public school sites. Insofar as an alternative site is closer to the private school than is the public school site, it is educationally preferable to use the

alternative site. (Pls. Exhibit 3, ¶¶ 21-23)

41. To minimize the loss of instructional time, most private school students are transported between the private school and the Chapter 1 public school site by mini-vans or buses. These vehicles are owned and operated by private companies which are under contract to the Board to transport students between their homes and schools at the beginning and end of the school day, and are thus available for Chapter 1 purposes during the intervening hours of 9:10 a.m. to 2:30 p.m. Private school students who attend a public school site which is within one block of their own school normally walk. (Pls. Exhibit 3, ¶¶ 23-25)

42. For the 1986-87 school year, the Board was able to offer Chapter 1 services at public school sites to students attending 194 private schools. The students in 52 private schools accepted this offer. The number of private school students who participated in the Chapter 1 program in the 1986-87 school year, decreased by approximately 50% from the number who participated in the 1985-86 school year.

43. Objections to the public school sites, as expressed by many private school principals, included: the loss of instructional time caused by travel (it was noted that the travel time computed by the Board was just for travel between the two schools, and that additional time was lost in walking to and from classrooms, particularly those on upper floors); drug dealing and other criminal activities near the private school, the public school or both; heavy traffic and high accident rates on the route; and the reluctance or unwillingness of many parents to have their children leave their school building or travel during the school day. Some private school principals indicated that their students would

attend public schools that were closer to the private school than the public school site offered; however there was no available space in those public schools.

44. Since the post-Aguilar delivery methods were instituted, there has been a continuing decline in the number of public school sites which have been utilized in the Chapter 1 program. Thus, over the initial five year period using the post-Aguilar delivery methods, the number of public school sites utilized decreased from 49 to 18. Most of this decrease was due to increased overcrowding in the public schools. Of the 31 public school sites which were lost during this five year period, 20 were lost because the public school needed the classroom space for its own students regular educational program.

45. In school year 1986-87, 3,578 students attending 52 private schools received their Chapter 1 services at 49 public school sites. In subsequent school years, the figures were as follows: in 1987-88, 2,508 students from 42 private schools received services at 39 public school sites; in 1988-89, 2,591 students from 39 private schools received services at 37 public school sites; in 1989-90, 1,928 students from 29 private schools received services at 27 public school sites; and in 1990-91, 1,578 students from 20 private schools received services at 18 public school sites.

46. Over the following three school years, 4 public school sites were dropped and 1 was added. Of the 4 public school sites that were dropped, 3 were lost because the public school needed the classroom space for its own students. During 1993-1994, 1,219 students from 16 private schools received services at 15 public school sites

47. I am informed by counsel that plaintiffs have

taken the position that defendants should provide Chapter 1 services to private school students at public school sites, in classes composed of both public and private school Chapter 1 students. Both before and after the Aguilar decision, all Chapter 1 classes, with one exception, have always been composed of students from the same school. (The exception was an English as a Second Language program given at a leased site. Two private schools each had a small number of eligible students and it was possible, and more efficient, to conduct classes for children from both schools.)

48. Plaintiffs' proposal would be impossible to implement. First, there is simply no room in the New York City public schools for all private school Chapter 1 students, who now number almost 22,000. This was true even when the Board first implemented its post-Aguilar delivery methods in September 1986, since then, the overcrowding situation has become much worse. (Of course, plaintiffs, alternative proposal, that all private school students receive their Chapter 1 instruction as the last class of the school day, would require far more space than if services were provided throughout the school day. It would also be extremely difficult to staff plaintiffs' proposed end-of-school-day program; Chapter 1 teachers now teach 4-5 classes per day, pursuant to their union contract. It is hard to imagine how staff could be scheduled under plaintiffs' proposal.)

49. As of October 31, 1986, the student enrollment in New York City's public schools was 940,208. As of October 31, 1994, the student enrollment was 1,034,235, an increase of 94,027 public school students. This is an increase of 10%, in just 8 years.

50. As is fully described in a January 1995 report by the Comptroller of the City of New York, Overcrowding

in New York City Public Schools: Where Do we Go from Here? (a copy is annexed hereto as Exhibit "C"), public school overcrowding became particularly severe starting in the late 1980's. The major cause has been a rapid increase in enrollment growth since 1989. In addition, in 1988, the Board significantly reduced class sizes, which further increased overcrowding. The rate of increased enrollment is now 21,000 students per year, due primarily to immigration and the high number of births. The current growth rate is expected to continue into the next century. (Exhibit "C," pp. ES1, 1, 3 (figure 2).)

51. As the Comptroller's Report indicates, the system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats. Since the construction of new school buildings is too costly and too slow a process to address the great and growing space need, other solutions, some drastic, are being explored. These include double shifts (students attend school on different shifts), a year-round school calendar and large-scale busing of students to other, underutilized schools. (Exhibit "C," pp. ES1, 30-50)

52. In terms of plaintiffs' proposal that the almost 22,000 private school students now enrolled in Chapter 1 be served in public school sites, the overcrowding situation is even worse than the overall figures suggest, since a majority of the Chapter 1 private school students attend school in areas where the public schools are most overcrowded. In the 1993-94 school year, 59% of the private school Chapter 1 students attended schools which were located in the 15 most overcrowded community school districts. As explained in the Comptroller's Report, increased immigration is the major cause of the increase in enrollment, and immigrants frequently congregate in particular neighborhoods. As a

result, the overcrowding is far more severe in some areas than in others. (Exhibit "C," pp. 4-8, 12-22). Since eligibility for Chapter 1 includes a requirement that the student reside within the attendance boundaries of a participating public school in a low income area, the Chapter 1 programs are also concentrated in certain areas, which are often areas where large numbers of immigrants reside and the public schools are most crowded.

53. In addition to the overcrowding problem, plaintiffs' proposal that private and public Chapter 1 students be integrated into Chapter 1 classes located in the public schools is educationally unsound and logistically unworkable.

54. First, there would be serious educational problems in integrating students from different schools in one Chapter 1 class. If, for example, in an integrated Chapter 1 remedial mathematics class, the students from the public school were working on division in their regular class, while the students from the private school were working on multiplication in their regular class (which is always taught before division), there would be no way to effectively supplement the math instruction and learning of both sets of students. Plaintiffs' proposal would thus violate the state and federal guidelines and mandates, discussed below and in the declaration of Michele Nowosad, that Chapter 1 instruction be coordinated with the students' regular classroom instruction.

55. Another educational problem would arise when the nearest proximate public school with a comparable program for the same grades in the same subject areas was a long distance from the private school. If the travel time becomes excessive and there is a significant loss of regular instructional time for the private school students, then, as

discussed above, that is a significant educational problem and raises concerns regarding the equitability of the services.

56. In addition, it would be impossible to synchronize the schedules of the approximately 22,000 private school students and 237,000 public school students enrolled in Chapter 1, who attend hundreds of different schools. First, the schools' calendars are different. The private schools generally start and end the school year earlier. Second, many of the private schools close for religious holidays on days when the public schools are open and Chapter 1 instruction is given in the public schools. (Although the public schools are closed for major Jewish holidays due to staffing problems, most private Hebrew Day Schools observe additional holidays.) Third, the starting and ending times of school days varies by school. Some private schools start and end their school day earlier than most public schools, while some private schools end their school day later than most public schools. Finally, due to overcrowding, the Board has implemented double shifts in a significant number of public schools, and is now considering expanding this practice because of the growing space shortage. (Exhibit "C," pp. 38-42) In a double shift system, the school day is either earlier or later than the usual school day.

57. In addition, private schoolchildren are sometimes delayed by traffic while traveling to their Chapter 1 sites. Under plaintiffs' proposal, the Chapter 1 teacher could either wait for the private schoolchildren, thereby diminishing the public schoolchildren's instructional time unnecessarily, or start without the private schoolchildren, which would create instructional problems when they arrived in the middle of the lesson.

58. Further difficulties would result from internal scheduling differences between schools. A private school may schedule lunch hour for its fourth graders at 12:30 p.m., while the closest public school with a Chapter 1 program for fourth graders may schedule lunch for this grade at 11:30 a.m. Assemblies for the fourth grade may be scheduled for different days and times at the different schools. Either the public school would have to accommodate its schedule to the private school, or public officials would have to seek a rescheduling of the private school's regular program, which raises a concern regarding government intrusion into the private school's program.

59. Significantly, the regular classroom instruction in the Chapter 1 area, mathematics for example, might be scheduled for different times of the day in the private and public school classes whose students are to be integrated. If students were to miss this regular classroom instruction, not only would it be educationally counterproductive since they require remediation in the subject, but it would be contrary to the statutory requirement that Chapter 1 supplement but not supplant the regular classroom education.

60. Another problem is the different educational methods and programs used in providing Chapter 1 services to public school students. As is more fully explained in the declaration of Michele Nowosad, Chapter 1 services for public school students are provided through a variety of instructional methods and programs which are not used for private school students and which cannot be integrated with the Chapter 1 services provided to private school students. Examples are prekindergarten programs, programs for neglected and delinquent children and schoolwide projects. None of these programs are provided to private school students.

61. Further, both the state and federal governments have been advocating increased use of the "Push-in" method for Chapter 1 instruction in the public schools. In this method, the Chapter 1 and regular classroom teachers jointly teach the entire class, with special emphasis on the needs of the Chapter 1 students. Not only would it be disruptive for private school students to join such a class for a period, but the instruction usually occurs in a full class, so there would frequently be no room to add students from the private schools. Similar problems would arise with the "Pull-aside" method of providing Chapter 1 services, which is used for public but not for private school students. In this method, the Chapter 1 teacher provides services by "pulling aside" the Chapter 1 students to the side or the back of the regular classroom.

62. Finally, integrating the private and public school students' Chapter 1 classes would be an accounting nightmare, if not an impossibility. The Chapter 1 statute and regulations require that Chapter 1 funds be allocated into two separate "pots" for public and private school (including non-sectarian private school) students, based on the proportional number of eligible students in each group. The expenditure of these funds is subsequently reported to, and reviewed by SED, always within the framework of whether the funds were drawn from the private or public school allocation.

63. The impossibility of maintaining this required accounting system under plaintiffs' proposal can be shown by some examples. If a Chapter 1 teacher has classes composed of students from both public and private schools, and during the course of the year, at various times, 2 private school students and 3 public school students leave her classes, because their families move, etc., then computing

what portion of her salary should be attributed to the public and private school allocations becomes extremely difficult. If a teacher holds a parent workshop, and 60% of the parents who attend are public school parents, whereas the class contains only 50% public school student's, how is that time allocated? The situation of the guidance counselors, school social workers and psychologists might be even more complex, since their sessions with students may vary over time in accordance with the students, needs. These employees might need to keep detailed time sheets, as though they were recording billable hours. Even if such data could be obtained, tabulating it for the thousands of employees who work in the public and private school Chapter 1 program in New York City would be a mind-boggling task.

Mobile Instructional Units ("MIUs")

64. As discussed above, when the Board first created its post-Aguilar delivery methods for the 1986-87 school year, there were many more public school sites available than in subsequent years. However, even in 1986, no appropriate public school sites could be found for the Chapter 1 students of 48 private schools.

65. Accordingly, mobile instructional units were obtained for these eligible private school students. Based on the number of Chapter 1 students in these private schools, and the types of services provided to these students, it was determined that 70 MIUs would be required.

66. Approximately 50% of the MIUs serve students at more than one private school, often on the same day. Some MIUs serve students from schools of different religious affiliations on the same day.

67. The mobile instructional units are large vehicles equipped as classrooms. They have been specially designed to comply with the stringent York City, health and safety code requirements for space occupied for the instruction of children.

68. The MIUs have also been specially designed to meet the needs of the Chapter 1 program. Under SED guidelines, which apply to both public and private school students, the maximum size for a Chapter 1 class with one teacher is 10 students. However, space is also required for students' sessions with guidance counselors, social workers or school psychologists, and for conferences between Chapter 1 staff and private school staff or private school parents. In addition, classes in English as a Second Language usually have no more than four students. Since the Board sought to maximize the use of each MIU, and thereby minimize the number of MIUs and their total cost, the interior of each MIU contains a folding partition. When the partition is closed, the larger section can accommodate a class of 10 students and a teacher, and the smaller section, which seats 4 younger or 3 older students, can simultaneously accommodate either an English as a Second Language class, or a guidance session, or a parent-teacher conference, etc. If the MIUs had not been constructed in this manner, then 2 MIUs rather than 1 would be required to accommodate this simultaneous activity.

69. The Board designed specifications to meet the applicable code requirements and educational needs, and then solicited competitive bid proposals from private contractors for the leasing of MIUs. The Board had no facility in which a large number of vans could be garaged, stored, cleaned, repaired and maintained. Other school systems had found such facilities very expensive to build and operate, and in

their experience, vandalism and insurance coverage were also expensive.

70. Accordingly, the MIU contract requires that the supplier also provide garage, maintenance, repair, cleaning, security and insurance. The contract further requires the supplier to build and maintain spare vehicles, which can be used as replacements when necessary, to avoid disruptions in service. Finally, the contract requires that the supplier provide a driver for each MIU, who not only drives the MIU between the garage and the private school, but remains in the MIU or the area surrounding the MIU during the school day to provide security. Security is a serious concern in regard to the MIUs, since they are parked in the open on public streets, usually in high-crime areas. There have been incidents, including one shooting, which occurred right outside an MIU.

71. The MIU contract was awarded to Ferdinand Arrigoni, Inc., which uses the trade name New York Bus Service. Ferdinand Arrigoni, Inc. is a private company. I have verified that the company is not owned or operated by a religious organization.

72. Four color photographs, showing the exterior and the interior of MIUs leased from Ferdinand Arrigoni, Inc. are annexed hereto as Exhibit "D." (Plaintiffs have annexed black-and-white xerox copies of some of these photographs to their motion papers at Exhibit "10.") The serious security concerns associated with the MIUs are reflected in the design of these vehicles. As the photographs show, the windows in the classroom areas are all relatively high and small, and the windows are covered with a heavy wire grid.

73. As can be seen from these photographs, the exteriors of the MIUs bear the words "New York Bus Service" in large, contrasting, highly-visible lettering. These words appear on all four sides of each MIU. In addition, two sides of the exterior of each MIU bear a circular decal, 18 inches in diameter, with the seal of the Board of Education. There are no religious symbols on either the interiors or the exteriors of the MIUs.

74. The MIUs do not obtain electricity from the private schools; each MIU carries a generator which supplies all electrical power. There are no telephones in the MIUs. Each MIU is equipped with a walkie-talkie, which is used by the driver for emergency communication with the private school regarding, for example, a security concern or an unexpected delay in releasing the students for a Chapter 1 class. The MIU driver takes one of the walkie talkie units into the private school office at the beginning of the school day and retrieves it at the end of the day.

75. There is storage space on the MIUs for equipment, material and supplies. However, since the space is not unlimited, the Chapter 1 teacher usually stores surplus supplies and materials in the private school. As the need arises, the teacher replenishes her supplies and materials from this surplus stock. On average, our teachers replenish their supplies from this surplus stock approximately once a month, or even less frequently.

76. There are no bathrooms, lunchrooms or infirmaries on the MIUs. If the MIUs contained such facilities, they would have been far more costly. In addition, their size might have been too unwieldy for driving and parking on New York City's public streets.

77. The maintenance and operation of the MIUs are under the sole control of New York Bus Service at all times, including the time when they are used to provide Chapter 1 services to private school students. The educational use of the MIUs is under the sole control of the Board of Education at all times.

78. The MIU drivers wear badges and uniforms, approved by the Board of Education, which indicate that they are employees of New York Bus Service. Other personnel who work on the MIU are a Board of Education Chapter 1 teacher, and sometimes a Board of Education Chapter 1 guidance counselor, social worker and/or psychologist. These personnel are assigned to MIUs without regard to their religious affiliation, if any.

79. When in service, the MIUs are parked on a public street near the private school whose students are receiving services; the MIUs are never parked on private school property. The exact parking space for each MIU is determined by the New York City Department of Transportation, which must consider such factors as the location of fire hydrants, the safety requirement that the doors to the MIU open to the curb rather than the street (which creates siting limitations on one-way streets) and the preference to keep the street area directly in front of the school entrance free of parked vehicles, again for safety reasons. Accordingly, the MIUs are not generally parked directly in front of the school entrance, but are parked either on the same block as, or around a corner from, an entrance to each private school.

80. When not in use for Chapter 1 purposes, the MIUs are driven to and stored in a private garage or storage facility owned or leased by Ferdinand Arrigoni, Inc. The

MIUs remain garaged during evenings, weekends, and private school summer breaks and holidays.

81. The only instruction provided in MIUs is secular Chapter 1 instruction. They are not used for instruction in religious subjects, nor for the private schools, educational programs.

82. During the school years 1986-87, 1987-88 and 1988-89, the Board of Education leased 70 MIUs. The Board then entered into an agreement to lease an additional 58 MIUs, which were delivered over a period of time. By the end of 1989-90, the Board was leasing 92 MIUs, and by the end of 1990-91, the Board was leasing 128 MIUs. No additional MIUs have been leased since that time; indeed, in the 1994-95 school year, the number of MIUs was reduced to 126.

83. The number of private school students who received Chapter 1 services in MIUs were: in 1986-87, 5,503 students from 72 private schools; in 1987-88, 5,546 students from 72 private schools; in 1988-89, 5,843 students from 71 private schools; in 1989-90, 7,733 students from 96 private schools and in 1990-91, 9,296 students from 138 private schools. In 1993-94, 11,622 students from 141 private schools received services in MIUs.

Leased Sites

84. A leased site is a building or part of a building that the Board leases and uses to provide Chapter 1 services to private school students.

85. From the time of the Aguilar decision to the beginning of the 1986-87 school year, the Board made

inquiries concerning nearly 500 potential leased sites. Of these, only about 150 sites had available space which might be suitable for classroom occupancy; all 150 sites were inspected. Approximately 475 of the original 500 potential Leased Sites were rejected for one or more reasons: they were not religiously neutral; they had no space available for Chapter 1 purposes; the landlord was unwilling to rent the site to the Board; they were unsuitable for classroom instruction or they would have required extensive, lengthy, and costly renovations. (Exhibit "4" in support of Plaintiffs' Motion for Summary Judgment, Supplementary Affidavit to the Chancellor's Fourth Bi-Monthly Report which Described the Alternative Plan for September 1986 (hereafter "Pls. Exhibit 4"), ¶¶ 18-20.)

86. Of the original 500 potential leased sites, 190 were owned by religious organizations. The Board rejected 141 of these 190 sites because they were not religiously neutral.

87. The Board carefully inspects every potential leased site as to its religious neutrality. The Board approves leased sites without regard to the religious affiliation, if any, of the owner.

88. Neither the interiors nor the exteriors of the buildings where the leased sites are located bear any visible religious symbols. If such symbols are present, they are either removed or covered. The leased sites are identified as Board of Education facilities, with signs measuring approximately 2 feet by 1-1/2 feet that read: "New York City / Board of Education / Chapter 1 Facility".

89. Each of the Board's leased sites is within a building or is an entire building, that is separate from the

private school building(s) whose students are served at the sites.

90. Near the beginning of the 1986-87 school year, the Board leased thirteen sites to provide Chapter 1 services to private school students. These thirteen sites were available quickly and inexpensively. They were either ready for use as classrooms or could easily be made ready by the installation of minor items such as a new lock or a fire alarm. (Pls. Exhibit 4, ¶ 22.)

91. Of these thirteen sites, eleven were part of a building (some as small as one room) and one was an entire building. The final site was in a building which was completely leased and occupied by the Board. One part of the building was leased and used for Chapter 1 services for private school students. The rest of the building was leased by the Board for special education programs for public school students. In 1990, the Board purchased the latter building, and continues to use it for special education for public school students and for Chapter 1 services for private school students. Although the building is now a public school, the space used for Chapter 1 continues to be treated as a "leased site, " for administrative purposes and it will be so categorized in this declaration.

92. Of these thirteen leased sites, twelve were closer to at least one of the private schools whose students they served than was the nearest public school with available space (and the thirteenth site was approximately the same distance). The use of these leased sites thus reduced the travel time and increased the regular classroom instructional time for the students. (Pls. Exhibit 4 ¶ 24).

93. The only activity which occurs at each leased

site is secular Chapter 1 instruction. The leases for these sites provide that, for the duration of the lease, the Board of Education has exclusive use and occupancy of the leased site and no religious activity or instruction will occur anywhere in the building where the site is located.

94. Of the 13 sites that the Board leased near the beginning of the 1986-87 school year, 11 were owned by Roman Catholic organizations; 1 was owned by a Jewish organization; and 1 was owned by a secular corporation. During the subsequent school years the figures were: 1987-88 -- 12 leased sites, 10 owned by Roman Catholic organizations, 1 by a Jewish organization and 1 by a secular corporations 1988-89 -- 9 leased sites, 7 owned by Roman Catholic organizations, 1 by a Jewish organization and 1 by a secular corporation; 1989-90 -- 9 leased sites, 7 owned by Roman Catholic organizations, 1 by a Jewish organization; and one by a secular corporation and 1990-91 -- 10 leased sites, 6 owned by Roman Catholic organizations, 1 by a Jewish organization, 2 by secular corporations and 1 by the Board of Education.

95. The number of private school students who received Chapter 1 services in leased sites were: in 1986-87, 1,580 students from 17 private schools; in 1987-88, 1,353 students from 14 private schools; in 1988-89, 1,117 students from 13 private schools; in 1989-90, 1,093 students from 14 private schools and in 1990-91, 1,012 students from 13 private schools.

96. The use of leased sites has continued in similar fashion. In the 1993-94 school year, there were 11 leased sites, 6 were owned by Roman Catholic organizations, 3 by Jewish organizations, 1 by a secular corporation and 1 by the Board of Education. In 1993-94, 1,601 students from

14 private schools, received Chapter 1 services in leased sites.

97. The leases for the thirteen original sites provided that the Board would use the sites rent-free until January 1987. The annual rental for these thirteen sites was \$4.75 per square foot, which was at the low end of the range of the Board's usual cost for similar leased space.

98. Under the terms of the leases, the owners of the sites are responsible for the costs of cleaning, maintaining, and repairing the sites. I am informed that plaintiffs assert that the Board is responsible for the cost of bringing the sites into compliance with New York City codes for classroom occupancy, and that plaintiffs submit Board of Education resolutions which support this conclusion. (Pls. Exhibit "25.") The pertinent boilerplate provision of these resolutions states that "the cost of such work will be paid by the Board of Education, pursuant to the terms of the lease." The lease terms provide that the owner is responsible for the cost of such work. (A typical lease agreement used for the leased sites is annexed as Exhibit "E." The pertinent provisions are at Articles 7 and 12 of the lease and the 7th, 90th and 14th paragraphs of the Board of Estimate resolution authorizing the lease, which is annexed to the lease as Attachment A.)

99. However, it is insignificant whether the Board or the owners are responsible for paying these costs, since there were no leased sites in which any substantial work was performed to make the sites code compliant. The only work performed has been the installation of minor improvements, such as the installation of a few fire alarm boxes and panic hardware (i.e., a horizontal bar mounted on a door that, when pushed, allows egress through a door that is locked

from the outside). The Board did pay for these few minor improvements. However, if upon inspection of a potential site, the Board discovered that work other than the installation of such minor items was required to achieve code compliance, the Board did not lease the site. In two instances, after a site was leased, it was discovered that there were problems which would have required substantial work. In one leased site, which was occupied for a few months, an asbestos problem was discovered. In the other leased site, serious leaks developed after the Board had occupied the site for a number of years. In both cases, the Board terminated the lease for the site upon learning of the problem. The lease provides for termination by the Board upon thirty days, notice (Exhibit E, Article 4).

Computer-Assisted Instruction

100. In computer-assisted instruction ("CAI"), private school students receive Chapter 1 instruction through computers that are linked by modem or by dedicated telephone lines to a Board of Education office. The Board began using CAI to serve private school students in the 1987-88 school year.

101. CAI utilizes both desk-top computers that are installed in the private schools, usually in dedicated rooms used exclusively for CAI (referred to as "CAI rooms"), and lap-top computers that are distributed to private school students for use at home.

102. Chapter 1 teachers are not present in the private school during CAI use. When students use the computers installed in the private schools, data recording their work is transmitted electronically to a Board of Education office, where Chapter 1 teachers monitor the

students' work, print and review reports of their progress, and adjust each student's curriculum as appropriate.

103. Through the 1993-94 school year, the two Board of Education offices where Chapter 1 teachers were located were at 347 Baltic Street and 49 Flatbush Avenue, both in Brooklyn. (One office was recently relocated to another Brooklyn site.) The CAI system was designed to comply with the dictates of the Aguilar decision.

104. The only Board of Education employee who is present in the CAI room while the private school students work on the computers is a non-instructional technician (referred to as a "CAI technician"). These technicians are non-professional employees; their civil service title is school aide. They are not computer programmers or otherwise expert in the use of computers. They do not install or repair the computers; those functions are performed by other non-instructional personnel. The CAI technician's primary duty is to maintain order among the students. They also take attendance, maintain student records and perform elementary functions with the computers, specifically turning them on and off, rebooting them and bringing up the program, if necessary.

105. My Bureau has issued written guidelines for its Chapter 1 personnel. The guidelines applicable to CAI technicians provide that they may not, under any circumstances, instruct the students, or assist them in anything but the operation of the computers. CAI technicians are expressly prohibited by the guidelines from reading to students, defining or spelling words for them, or helping them with mathematical calculations. For example, if a student asks a technician the definition or spelling of a word, the technician may not provide the answer, but may

allow the student to borrow a dictionary. I know of no violations of these provisions of the guidelines. (Exhibit "F" annexed, Administrative Procedures for Non-Instructional Technicians (School Aide) Assigned to Chapter 1 Computer Room, dated October 14, 1988, at p. 3, and attached memo, dated May 27, 1988, from Margaret O. Weiss to Non-instructional Technicians.)

106. My Bureau has also issued guidelines for Chapter 1 teachers, which require the CAI teachers to maintain communications on a regular basis with the CAI technicians by telephone, at the beginning of the school day. In addition, if there are problems with the operation of the computers, the Chapter 1 teacher learns of this through monitoring the students, computer work product. (These guidelines are attached as Exhibit 29 to plaintiffs' summary judgment papers, p. 2.)

107. There are many electronic and physical safeguards to insure that the CAI computers are not usable for any purpose other than Chapter 1 instruction.

108. There are two types of CAI computers installed in the private schools. Some of the computers are "dumb" terminals that do not have their own central processing units or disk drives. These "dumb" terminals automatically connect themselves to a Board of Education site when they are turned on; thus, their use is subject to electronic monitoring, as described above. A data line connects these "dumb" terminals to the main computer at the Board of Education site; the main computer transmits the Chapter 1 lessons electronically to the terminals in the private schools.

109. The remainder of the CAI computers installed

in the private schools are personal computers that have their own central processing units and floppy disk drives. The floppy disk drives are covered by locked security devices. The Board of Education has sole possession of the keys to the security devices, and the keys are kept at Board of Education offices and not in the CAI rooms or elsewhere in the private schools.

110. Not only is the software used in these CAI computers limited to that installed by the Board or at its direction, but the Board also electronically limits access to these computers to students enrolled in the Chapter 1 program.

111. The Board prohibits students who are not registered for CAI from using the Chapter 1 computers. Private school staff are also prohibited from using the CAI computers at any time. I know of no violations of these prohibitions, and given the electronic safeguards described below, it can be stated with some confidence that there have been no such violations.

112. The Board gives each student enrolled in CAI a password. To access a CAI computer, a student must enter his or her password, which automatically places the student in the program designated for him or her by a Chapter 1 teacher. The computers located in the private schools cannot be activated or used in any other way, except to print a student progress report pursuant to an electronic command transmitted by a Board Chapter 1 teacher located at the Board's office.

113. Only the Board's Chapter 1 personnel have the electronic capability of entering and deleting in the computer systems the names of students who may access the CAI

computers.

114. All but a few of the computers installed in the private schools are located in separate rooms, in which no other activity occurs while Chapter 1 CAI is given ("CAI rooms"). The only persons who may be present in the CAI rooms during CAI sessions are the students and the Board's CAI technician. I know of no violations of this requirement.

115. Almost all CAI rooms are used only for Chapter 1 instruction. Beginning in the 1988-89 school year, three schools in which CAI sessions are held only two or three times a week have been allowed to use the CAI rooms for other purposes on the days when there are no CAI sessions.

116. In a few private schools, the small number of Chapter 1 eligible students warranted the installation of only one computer. Beginning in April 1989, one CAI computer (each a "dumb" terminal type) was installed in some of these schools in a room that the schools may use for other purposes (such as a supply room) at any time. Through the end of school year 1990-91, this arrangement has been used in a total of four private schools. None of those four schools continue to use this arrangement, however, this arrangement has been implemented in two other private schools since 1991.

117. In addition to the CAI computers that are installed in private schools, the Board of Education has acquired and distributed "lap-top" computers for use in the homes of some Chapter 1-eligible private school students. These lap-tops have been electronically "encrypted" so that they are only usable for Chapter 1 instruction.

118. Each lap-top is a PC that has only a floppy disk drive (no hard disk drive). The PC hardware (i.e., "mother board") has been altered so that the disk drive can read only the floppy disks that the Board provides with the computers. These floppy disks are dialing disks; their only capability is to automatically dial a local area network when the computer is turned on, which connects the lap-top to the software company. The Chapter 1 instructional programs are then transmitted to the lap-top. The Chapter 1 teacher at the Board of Education office can electronically monitor the student's work and adjust the lessons appropriately. The process is similar to that used with the CAI computers installed in the private schools.

119. The Board selects all the software which is used in CAI. No software is used which could be diverted for religious purposes, or for any secular purpose other than CAI. For example, to ensure non-divertibility, the Board does not use wordprocessing, graphic or spreadsheet software in CAI.

120. The computer hardware and other equipment used in providing CAI is labeled as property of the Board of Education.

121. There can be no religious symbols in the CAI rooms. During the 1994-95 school year, a CAI technician reported that a crucifix had been placed on a wall of a CAI room. The Board informed personnel of the private school that the crucifix had to be removed. When it was not removed after about five school days, the Board ceased providing CAI to students of that school. The Board resumed CAI services approximately one week later, after verifying that the crucifix had been removed. I know of no other instance where the requirement that there be no

religious symbols in the CAI rooms has been violated.

122. From an educational perspective, as the Chapter 1 achievement tests demonstrate, it is preferable for students to have face-to-face interaction with teachers, rather than to work only on computers. Some but not all private school students who receive CAI also receive some face-to-face instruction from Chapter 1 teachers in public school sites, MIUs, or leased sites.

123. In school year 1986-87, no students received Chapter 1 services through CAI. In subsequent school years, the figures were as follows: in 1987-88, 2,135 students from 22 private schools; in 1988-89, 4,802 students from 78 private schools; in 1989-90, 7,258 students from 111 private schools and in 1990-91, 8,488 students from 138 private schools.

124. As explained above, CAI is not as educationally effective as face-to-face instruction. A combination program, generally using CAI two days per week and face-to-face instruction one day per week, is therefore educationally preferable. The Board has not been able to provide combination services to all students who receive CAI, because of the limited availability of public school sites, leased sites and MIUs, and because face-to-face services were declined for some of the private school students who receive CAI.

125. Combination services were offered beginning in school year 1988-89. The number of students who received combination services are a subset of the number of students, listed above, who received CAI. In school year 1988-89, 1,003 students from 25 private schools received Chapter 1 combination services. In subsequent school years,

the figures were as follows: in 1989-90, 1,546 students from 36 private schools and in 1990-91, 2,356 students from 67 private schools.

126. CAI and combination services have continued to be provided to private school students in the Chapter 1 program. In school year 1993-94, 9,662 students from 149 private schools received CAI. Of these, 2,115 students from 63 private schools received combination services.

Stationary Instructional Units

127. Stationary instructional units ("SIUs") are small structures built to accommodate Chapter 1 classes. Although the Board has not used SIUs as a post-Aguilar delivery method, we did investigate the possibility of using them in our post-Aguilar program. I understand that plaintiffs are asserting that the Board should have used SIUs.

128. There were several concerns about the use of SIUs. The first was a legal concern. At the time this alternative was considered, in 1988, there were serious legal concerns raised by the placing of SIUs on property owned by religiously-affiliated private schools. SED initially stated that this was prohibited because of Aguilar (Exhibit "B" annexed) and DOE stated that this could be done only in limited circumstances (DOE Guidance of June 1986, Exhibit "C" to the Fagan Declaration, pp. 3-6). The Board accordingly planned to use SIUs, if at all, only in a small pilot program, which could serve to test their legality.

129. With great difficulty, the Board was able to locate three sites after extensive canvassing of the private schools to find available land on either private school property or other nearby available land, such as an empty

lot. Vacant land is an extremely scarce commodity in many New York City neighborhoods.

130. We then began investigating the cost of constructing the SIUs. Initially, we anticipated that the cost would be relatively inexpensive, and that we could simply obtain a slightly modified version of the trailers that are used on construction sites. However, it seems that no endeavor of this nature is ever simple or inexpensive in New York City. For example, in addition to all the New York City health and safety code requirements, we learned that we would also have to comply with any design requirements imposed by the Municipal Art Commission, a body created by the New York City Charter, which is empowered to review designs for buildings and other structures erected on land owned or leased by local government. We met with the Commission, which proposed significant design modifications to make the structure more visually appealing. (It should be emphasized that their concern was primarily for the exterior appearance and the visual impression given to anyone who would use the street, rather than for the interior of the structure, which would most affect the students.) The Commission suggested we put a peaked roof on the structure, criticized the visual rhythms created by the fenestration (i.e., the windows), etc.

131. We also determined that obtaining an electricity hook-up would be costly. When all these factors were considered, we estimated that the initial cost for constructing each SIU would be \$100,000. (Exhibit "G" annexed hereto, letter to Robert Eshard from Steven Schwager dated May 26, 1987). Further, the likelihood of vandalism in these high-crime areas was a problem that would have to be addressed through additional operating expenditures for security, insurance and maintenance and

repair services. Accordingly, SIUs did not appear to be nearly as cost-effective as originally anticipated.

132. I am informed that plaintiffs assert that we should have placed SIUs on public school property. This would have deprived the public schools of a portion of their schoolyards, which are normally used for recreation and physical education. The number of Chapter 1 students in many private schools would have required several SIUs to accommodate the program. This would have meant the loss of a substantial amount of the very limited open space available to the public school. Based upon information provided by the Board's Division of School Facilities, there is no record that any public school has ever been forced to give up a portion of its schoolyard for the benefit of students from another public school or a private school. Further, it is almost certain that plaintiffs' proposal would have been bitterly opposed by the public schools involved.

133. In addition, plaintiffs' proposal would have necessitated the same loss of instructional time through travel that was described above in relation to public school and leased sites. One of the primary reasons for using SIUs would have been to eliminate travel and the resulting loss of instructional time.

Generally Applicable Provisions of the Chapter 1 Program for Private School Students

Board of Education Personnel

134. The teachers and other personnel who provide Chapter 1 services to private school students in New York City are Board of Education employees. They are hired and assigned by the Board without regard to their religious

affiliation, gender, race, national origin, or whether they speak languages other than English.

135. Approximately 66% of the teachers, 88% of the guidance counselors, and 100% of the psychologists and social workers who are fulltime personnel employed in the Chapter 1 private school program, serve students from more than one school during the course of their workweek. As described in the annexed declaration of Marie DeCanio, at least 60% of the professional staff is of a religious affiliation different than that of one or more of the private school(s) whose students they serve.

136. My Bureau's written guidelines for our employees provide them with instructions for carrying out their duties under the unique circumstances resulting from the Aguilar decision. The instructions are designed to preserve the secular nature of the Chapter 1 program for private school students. The guidelines also provide instructions concerning other matters which arise in light of the itinerant and other unusual conditions in which most of our staff perform their duties. (Copies of the Guidelines for Staff assigned to CAI are at Pls. Exhibit 29; copies of the Guidelines for Staff assigned to MIUs, and the Guidelines for Staff assigned to Neutral Sites, are annexed hereto as Exhibits "H," and "I," respectively.)

137. The public school sites, neutral sites and MIUs may be used for conferences between the Board's personnel and the private school personnel concerning the Chapter 1 program. This is the only purpose for which the private school personnel may use a public school site, neutral site or MIU. These teacher conferences do not normally occur while the private school students are at the Chapter 1 sites.

138. I know of no violation of this restriction. It would be impossible for anyone to establish that this restriction has never been violated, since there are over 300 professional employees assigned to serve private school students at any one time, who work in over 170 different locations. However, based on my experience supervising the Chapter 1 staff, the emphasis we have placed in numerous staff meetings upon strict compliance with restrictions and guidelines because they reflect possible constitutional mandates, the results of unannounced visits by supervisors, and the concern which the staff has repeatedly expressed to comply with the restrictions and guidelines, it is my strong belief that had there been violations of this restriction, I would have learned of them.

139. An example will show the extreme care exercised by the Chapter 1 staff. Our staff may hold conferences with parents of the Chapter 1 students in the MIUs, but may not hold such conferences in the private schools. One of our Chapter 1 teachers made an appointment to hold a workshop with the parents of some Chapter 1 students. The workshop was scheduled to take place in an MIU, but the MIU was delayed because of inclement weather; it was raining heavily. When the parents appeared, rather than briefly taking them into the private school, the teacher took her written material from the trunk of her car, and stood in the street, distributing and explaining the material to the parents in the rain, before rescheduling the workshop.

140. The Board's personnel who provide Chapter 1 services to private school students are prohibited from providing instruction or clinical and counseling services in the private schools, except in certain emergency situations. In such emergencies, involving, for example, the death of a

teacher or another student known to the Chapter 1 students, a Chapter 1 guidance counselor, social worker or psychologist may, with permission from Board supervisors, provide emergency counseling in the private school. I know of no instance where the general prohibition against Board personnel providing services in the private schools has been violated.

141. The Board of Education's collective bargaining agreement with the United Federation of Teachers (the union which represents all teachers, guidance counselors, school social workers and school psychologists employed by the Board), governs announced visits by supervisors for the purpose of formal observations. Pursuant to this contract, every tenured professional employee receives one announced visit by a Board supervisor each year for purposes of a formal observation and evaluation. Every non-tenured professional employee receives three announced visits per year. The same requirements govern professional employees who serve public school students, in the Chapter 1 program and all other programs. In addition, Board supervisors make a number of unannounced visits to the Chapter 1 personnel who serve private school students.

142. The total number of both announced and unannounced supervisory visits to each professional employee is approximately ten per school year. During these visits, which are made to the public school site, neutral site or MIU, the Board supervisors, primary focus is on the effectiveness of the instructional or support services provided and the progress made by students. However, the supervisors also ascertain that the staff is generally complying with Board guidelines and mandates. These include both general requirements governing conduct applicable to all Board staff, and the guidelines and other

requirements designed to preserve the completely secular nature of the Chapter 1 program.

143. Although there have been quite a few instances where staff members have been cautioned and, in a few instances, disciplined, for violations of Board mandates relating to general conduct, such as attendance and punctuality, there has been only 1 instance, in the 9 years of the post-Aguilar program, in which a staff member was found to have violated any Board mandate concerning the secular nature of the program. The incident involved a guidance counselor, and occurred within months after our post-Aguilar program was first implemented. All of our staff had been instructed to remove their belongings from the private schools and to cease working in these buildings. This guidance counselor was using an office in the rectory to write his reports and to store files, but not to counsel students. He counseled the students in an MIU. Apparently, for his own convenience, he did not comply with the directive, and had to be individually ordered to move his belongings out of, and cease using the office in the rectory.

144. I know of no instance of the Board's Chapter 1 staff attempting to indoctrinate students in religious tenets, engaging students in discussions of religious issues, interfering with any student's freedom of religious belief, or in any way intruding into religious matters. Nor do I know of any instance of the Board's Chapter 1 staff interfering with, or becoming involved in, the operations of any private school. Again, based on the factors cited above, it is my strong belief that there have been no such occurrences.

145. Both the Chapter 1 statute and regulations and SED guidelines mandate that the Board's Chapter 1 staff

consult with private school personnel to develop programs that effectively supplement the students' regular classroom instruction.

146. The Board's Chapter 1 staff accordingly consult with the private school staff regarding the private school students, progress and needs. However, it is the Board's staff which determines the content and methodology of the instruction and clinical and guidance services provided through Chapter 1 to the private school students. The private school staff cannot dictate the content of, or methodology used to provide these services.

147. Neither the Board's Chapter 1 personnel nor the employees of the MIU or private bus companies enter private school buildings to escort students to a public school, leased site or MIU. The students are met at a door of the private school.

148. The Board prohibits its Chapter 1 personnel from attending any religious services or events at their students, schools. This prohibition extends to holiday observances, such as Christmas gatherings. I know of no violation of this prohibition.

149. The Board's Chapter 1 personnel receive their paychecks by mail or at Board offices, not at the private schools.

150. With one exception, the Board's Chapter 1 personnel do not monitor or inspect the private schools whose students receive Chapter 1 services. When a CAI program is proposed for a private school, noninstructional personnel from the Board inspect the room where CAI is to be installed, primarily for electrical capacity, to make sure

the room is appropriate for the purpose. At the same time, these Board personnel also check to make sure that the proposed CAI room is free of religious symbols.

Other General Provisions

151. All equipment used by the Board to provide Chapter 1 services to private school students (such as computers, desks, and chairs) is labeled or otherwise marked as property of the Board of Education. The equipment and supplies are inventoried annually.

152. All equipment and supplies remain the property of, and under the control of, the Board. All equipment and supplies are used only for the Chapter 1 program; none is made available to private school personnel.

153. In school year 1990-91, approximately 86% of the private school students in the Chapter 1 program attended Roman Catholic schools and approximately 8% attended Hebrew Day schools. The remaining 6% of the students attended schools that were Greek Orthodox, Lutheran, Episcopal, Ukrainian Orthodox, other denominational, or nondenominational. These figures were not markedly different during the years 1986-87 through 1993-94.

154. As discussed above, Chapter 1 classes are composed of students from the same school. Some private schools have all male or all female students, and the Chapter 1 classes for students from those schools are therefore composed of students of one sex.

155. Also as discussed above, the Board does not assign its staff based on gender, for classes of students from

these single-sex schools or for any other classes. I am informed that plaintiffs attach a copy of our responses to plaintiffs' interrogatory 21 (Pls. Exhibit "8"), and rely on the response to 21(i) for the assertion that the Chapter 1 staff for students of 2 of 4 single-sex private schools were all of the same gender as the students. This was actually the case for only 1 of these 4 single-sex private schools. The subsequent amended and corrected response to this interrogatory, states that the program for Aquinas High School, an all-girl school, had a Chapter 1 staff of both men and women. (Municipal Defendants' 2nd Supplementary Responses to Plaintiffs' First Set of Interrogatories, Response to 21(i), annexed as Exhibit "J"). In the instance where the Chapter 1 personnel were all of the same gender as the students, the staff was small and extremely stable.

The Non-Instructional Costs of Aguilar-Compliance

156. Regulations promulgated by DOE require that an LEA generally take the noninstructional administrative costs of providing Chapter 1 services "off the top" of the LEA's entire Chapter 1 allocation, rather than charging such costs solely to the group of students for whom they were incurred. (34 C.F.R. § 200.52(a)(2).)

157. This off-the-top policy, which was established by DOE prior to the Aguilar decision, applies to the noninstructional administrative costs of delivering Chapter 1 services to all (public and private, including non-sectarian, school) participating students.

158. Following the Aguilar decision, DOE stated, in its August 1985 written guidance, that the "off-the-top" policy should also be applied to the noninstructional costs of complying with Aguilar. (Exhibit B to the Fagan

Declaration, p. 6, question 15.) This directive was later promulgated as a regulation. (34 C.F.R. 200.52(a)(2).)

159. After Aguilar, the State of New York allocated funds to cover part of the noninstructional costs incurred by LEAs in response to Aguilar. Annual allocation of these funds began in the 1986-1987 school year, and continued through the 1990-1991 school year.

160. In 1988, the Chapter 1 statute was amended by enactment of 20 U.S.C. § 2727(d), which authorizes appropriations for "capital expenses" incurred by LEAs throughout the nation in providing equitable Chapter 1 services to private school students. Capital expenses are expenditures for noninstructional goods and services required to comply with Aguilar. (34 C.F.R. § 200.57(a)(2).)

161. The Board of Education's receipt of state funds under Chapter 53, and federal capital expense funds under section 2727(d), while not sufficient to cover all Aguilar costs, has allowed the Board to avoid taking most of its noninstructional costs of complying with Aguilar off the top of its total Chapter 1 allocation. This means that more funds have been available for instructional and support services for both public and private, (including non-sectarian) school students.

162. In some years, the Board has not had to take any of its Aguilar-related costs off the top, because of these two funding sources and "carryover" funds. Carryover funds are unspent funds from prior years; the carryover funds here were all originally allocated for private school students. These funds accrued during the early years of the post-Aguilar period, because the number of participating private school students decreased dramatically during those

years.

163. During 1986-87, the total expenditure for the Chapter 1 program in New York City, for both public and private (including non-sectarian) school students was \$190,146,061. Of this sum, \$7,506,800 were State funds provided pursuant to Chapter 53.

164. During 1986-87, the Board of Education took \$169,701 off the top of its Chapter 1 allocation to pay noninstructional administrative costs of delivering Chapter 1 services to private school students in compliance with Aguilar. If these off-the-top Aguilar compliance costs had instead been charged only to students attending private (including non-sectarian) schools, the Board's allocation for each eligible public school student would have increased by \$0.69 and for each eligible private (including nonsectarian) school student would have decreased by \$4.52.

165. During 1987-88, the total expenditure for the Chapter 1 program in New York City, for both public and private school students was \$197,657,498. Of this sum, \$7,484,000 were State funds provided under Chapter 53.

166. During 1987-88, the Board of Education took \$954,867 off the top of its Chapter 1 allocation to pay Aguilar-compliance costs. If these off the top costs had instead been charged only to students attending private schools, the allocation for each eligible public school student would have increased by \$4.09 and for each eligible private school student would have decreased by \$30.46.

167. During 1988-89, the total expenditure for the Chapter 1 program in New York City, for both public and private school students was \$257,512,021. Of this sum,

\$8,600,000 were State funds provided under Chapter 53.

168. During 1988-89, the Board of Education took \$ 297,221 off 1993-94 these identifiable transportation costs were \$16,188.

[paragraphs missing]

MIUs

172. During the school years 1986-87 through 1993-94, the Board of Education paid an annual rental of \$106,934 per MIU, which covered the use of each MIU for a 6 hour and 20 minute school day, and included the costs of the driver, garage, insurance, maintenance, and repairs. The Board has the option of using one or more of the MIUs for an additional two hours per day at a cost of \$75 per hour for each MIU, and has exercised this option for a varying number of MIUs over the years.

173. In 1986-87, the Board spent \$7,149,333 for the leasing and associated administrative costs of MIUs. The entire amount was covered by funds provided under Chapter 53.

174. In 1987-88, the Board spent \$7,335,877 for the leasing and associated administrative costs of MIUs. For this expenditure, the Board took \$208,258 off the top of its total Chapter 1 allocation, and the remainder from funds provided under Chapter 53.

175. In 1988-89, the Board spent \$7,594,249 for the leasing and associated administrative costs of MIUs. The entire amount was covered by funds provided under Chapter 53.

176. In 1989-90, the Board spent \$9,157,444 for the leasing and associated administrative costs of MIUs. A portion of this amount (\$7,671,651) was covered by funds provided under Chapter 53, and the remainder was covered by funds provided under section 2727(d).

177. In 1990-91, the Board of Education spent \$11,126,541 for the leasing and associated administrative costs of MIUs. A portion of this amount (\$7,372,263) was covered by funds provided under Chapter 53, another portion (\$2,799,887) was covered by funds provided under section 2727(d), and the remainder was covered by carryover funds.

178. In 1993-94, the Board of Education spent \$13,809,245 for the leasing and associated administrative costs of MIUs. For this expenditure, the Board took \$782,912 off the top of its total Chapter 1 allocation, a portion of this amount (\$9,067,333) from funds provided under section 2727(d)) and the remainder from carryover funds.

Leased Sites

179. In 1986-87, the Board spent \$135,532 for leased sites, including associated administrative costs. The Board took the entire amount off the top of its total Chapter 1 allocation.

180. In 1987-88, the Board spent \$387,963 for leased sites, including associated administrative costs. The Board took the entire amount off the top of its total Chapter 1 allocation.

181. In 1988-89, the Board spent \$279,082 for leased sites including associated administrative costs. The

Board took the entire amount off the top of its total Chapter 1 allocation.

182. In 1989-90, the Board spent \$198,508 for leased sites including associated administrative costs. The entire amount was covered by funds provided under section 2727(d).

183. In 1990-91, the Board of Education spent \$280,402 for leased sites including associated administrative costs. The entire amount was covered by funds provided under section 2727(d).

184. In 1993-94, the Board of Education spent \$87,670 for leased sites. There were no associated administrative costs for leased sites in this year. The entire amount was covered by funds provided under section 2727(d).

CAI

185. Under regulations promulgated by DOE, expenditures for computers used for CAI (as well as expenditures for CAI technicians) are considered instructional expenditures and are therefore charged entirely to funds allocated for private school students. (34 C.F.R. § 200.57(a)(2)(ii.)) These expenditures are not paid for by funds provided under Chapter 53 or section 2727(d), since those funds are reserved for noninstructional-administrative expenditures. Similarly, these expenditures are not taken off the top of the entire Chapter 1 allocation, since that procedure is also reserved for noninstructional administrative expenditures.

186. There are, however, some noninstructional

administrative expenditures for CAI. These are for central office expenses, such as the salaries of central office personnel who worked with CAI.

187. In 1987-88, the Board spent \$88,731 for the administrative costs of providing CAI. The Board took the entire amount off the top of its total Chapter 1 allocation.

188. In 1988-89, the Board spent \$273,032 for the administrative costs of providing CAI. The entire amount was covered by funds provided under Chapter 53.

189. In 1989-90, the Board spent \$348,942 for the administrative costs of providing CAI. The entire amount was covered by funds provided under Chapter 53.

190. In 1990-91, the Board spent \$225,711 for the administrative costs of providing CAI. The entire amount was covered by funds provided under Chapter 53. (The higher figure of \$240,382, which is provided in Municipal Defendants' Responses to Plaintiffs, First Set of Interrogatories, Response 8(g)(i), (Pls. Exhibit 36), represents the actual \$225,711 expenditure plus the 6.5% general administrative cost, which is discussed below.)

191. In 1993-94, the Board of Education spent \$245,348 for the administrative costs of providing CAI. The Board took the entire amount off the top of its total Chapter 1 allocation.

Regular Noninstructional Administrative Costs

192. There are, of course, also general noninstructional administrative expenditures for operating the Chapter 1 program in New York City for both public and

private school students. These expenditures have nothing to do with Aguilar compliance; they are simply the usual expenditures for administrative overhead, such as central office expenses.

193. In accordance with the terminology and practice adopted by SED, which audits, monitors and supervises the Board of Education's Chapter 1 program, the Board uses the term "indirect costs" to refer to the general administrative overhead costs.

194. A ceiling for indirect costs, expressed as a percentage of total expenditures (excluding purchases of equipment) is established annually by SED. (SED prohibits any assessment of indirect costs against purchases of equipment.)

195. The indirect cost rate for the Board of Education during the years 1986-87 through 1993-94 was 6.5% for federal Chapter 1 funds. For recordkeeping purposes, the Board computes the indirect costs by adding a uniform 6.5% administrative charge to each component of its federal Chapter 1 budget, except purchases of equipment.

196. The indirect cost procedure is effectively the same as deducting general administrative expenditures before breaking the budget into its various components, and implements the federal regulatory command that the noninstructional administrative costs of serving both public and private school students be charged to an LEA's total Chapter 1 funds. (34 C.F.R. § 200.52(a)(2).

197. The figures given above showing the amount spent on various items (e.g., MIUs, leased sites, etc.), are the actual expenditures for the items; they do not include the

6.5% indirect cost.

198. During school year 1986-87, the Board spent \$11,137,275 of its entire Chapter 1 allocation for these general administrative costs of serving both public and private school students under Chapter 1. In subsequent school years, the following amounts were expended for this purpose: in 1987-88 -- \$11,890,198; in 1988-89 \$15,112,098; in 1989-90 \$18,864,579 and in 1990-91 \$20,910,171.

199. In 1993-94, the Board spent \$24,353,056 of its entire Chapter 1 allocation for these general administrative costs.

Dated: Brooklyn, New York
June 9, 1995

[Margaret O. Weiss]
MARGARET O. WEISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, FLORENCE FLAST, HELEN
HENKIN, HAZEL SMITH, DENISE KROUSER and
CHRISTINA WALKER,

Plaintiffs,

-against-

88 Civ. 96 (JG)

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, COMMISSIONER OF EDUCATION OF
THE STATE OF NEW YORK, and CHANCELLOR and
BOARD OF EDUCATION OF THE CITY OF NEW
YORK,

Defendants,

-and-

RACHEL AGOSTINI, *et al.* and LEAH SAYS,

et al.,

Defendant-Intervenors.

AFFIDAVIT OF REVEREND VINCENT D. BREEN

Reverend Vincent D. Breen, being duly sworn,
proposes and says:

1. I am the Vicar for Education of the Roman Catholic Diocese of Brooklyn. I have served as Vicar or as Superintendent of Education since June, 1978. My administrative responsibilities include overall supervision of the elementary and secondary parochial schools in the counties of Queens and Kings.

2. I make this affidavit with the understanding that it will be submitted to the Court in connection with the cross-motions for summary judgment in this case.

3. On March 22, 1979, I executed an affidavit that was submitted to the United States District Court for the Southern District of New York in National Coalition for Public Education and Religious Liberty, et al. v. Califano (76 Civ 888). I understand that that affidavit was subsequently made part of the record in this Court in Felton v. Califano (Docket No. 78C 1750) -- the case that was subsequently decided by the United States Supreme Court under the name Aguilar v. Felton, 473 U.S. 402 (1985). A copy of that affidavit is attached hereto as Exhibit A.

4. Some of the statistical information contained in my 1979 affidavit is no longer current. Today there are 161 Catholic elementary schools and 22 Catholic secondary schools serving approximately 74,000 students in the two counties that constitute the Diocese. A total of 10,152 students from 97 of these schools received services under Chapter 1 during the 1993-94 school year. Those 97 schools have a total student population of approximately 31,000, of whom 19 percent are non-Catholic. The non-Catholic student enrollment in eight of those 97 schools is more than 50 percent. We do not have records that would show the percentage of those who receive Chapter 1 services who are non-Catholic, but there is no reason to believe that percentage is materially different from the non-Catholic population in the schools those students attend.

5. With the exception of statistics that are out-of-date, the information contained in my 1979 affidavit remains true today. In that affidavit, I described the Catholic schools whose students receive Chapter 1 [then Title I] services and

compared those schools to the "profile" of church-related elementary and secondary schools that has been described by the Supreme Court in certain of its decisions. My description of these schools and comparison of them to the "profile" remains accurate today.

6. I understand that the plaintiffs in this case have maintained that the "purpose and effect" of the current Chapter 1 program in New York "is to keep alive religious schools in this City by subsidizing a substantial portion of their general education program." See Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pl. Mem.11), at 58. This statement is completely inaccurate insofar as the Catholic schools in the Diocese of Brooklyn are concerned. Chapter 1 funds are not given to the schools themselves, but are received by the New York City Board of Education and disbursed for the benefit of economically and educationally deprived school children. Those funds do not, directly or indirectly, subsidize any portion of the general educational program of the schools of the Diocese. The services that are provided to students under Chapter 1 are supplemental to the general educational services provided by the Catholic schools in the Diocese of Brooklyn, and they are provided only to educationally disadvantaged students, not to the general population of students. They have not replaced any educational services that were previously offered by the Catholic schools in the Diocese of Brooklyn. As noted in my prior affidavit (at ¶ 6), the Catholic elementary and secondary schools in the Diocese of Brooklyn did not provide the types of remedial educational services available under Chapter 1 and its predecessor, Title I, prior to the commencement of the Title I program in New York in 1966. If these services were to become unavailable under the Chapter 1 program -- or if additional restrictions were to be

imposed that made it more difficult for students to receive those services -- the consequence would be that students would go without these important remedial services. The Catholic schools in the Diocese would not have the financial resources to provide the same services. The unavailability of those services would obviously impair the academic progress of some of the students in our schools, but it would not cause financial harm to the schools themselves.

7. It is simply inaccurate to say, as plaintiffs do, that but for Chapter 1 the vast majority of religious schools in this City "might not exist today" and that without an increase in Chapter 1 "they are not likely to continue to exist, at least as schools with a general educational program." Pl. Mem. 31. As noted above, Chapter 1 is not part of the general educational program of the Catholic schools in the Diocese, and the existence of those schools does not depend upon the maintenance of Chapter 1, much less an increase in Chapter 1 funding. The Catholic Schools in the Diocese are under financial pressures, as are all schools, but those pressures are not relieved by Chapter 1 funding, which does not flow to the schools and does not relieve the schools even indirectly of any financial burden that they would otherwise bear. Our schools are financially sound and are not in any danger of collapse. They enjoy the support of their local parishes and communities and of the many parents who find them to provide a safe, effective and supportive learning environment for their children.

[Vincent D. Breen]

Vincent D. Breen

Subscribed and sworn to before
me this 30 day of May, 1995.

Notary Public

My Commission Expires:

FLORENCE C. FLYNN

Notary Public State of New York

No. 01FL8341600

Qualified in Kings County

Commission Expires July 31, 19__

Plaintiffs,

v.

JOSEPH A. CALIFANO, Secretary 76 Civ. 888 (CHT)
of the United States Department
of Health, Education and Welfare,
et al., AFFIDAVIT OF
REVEREND VINCENT

Defendants, D. BREEN

and

JAMES and BESSIE BOVIS, et al.,

Intervenor-Defendants.

and

PHILIP and IDA FENSTER, et al.,

Intervenor-Defendants.

STATE OF NEW YORK)
)
COUNTY OF KINGS) ss:

REVEREND VINCENT D. BREEN, being duly sworn, deposes and says:

1. I am the Superintendent of Education of the Roman Catholic Diocese of Brooklyn. My administrative responsibilities include overall supervision of the education of approximately 125,000 students in the elementary and secondary parochial schools in the Counties of Queens and Kings.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Superintendent of Education for the Diocese of Brooklyn since June 1978. For two years prior to my appointment as Superintendent of Education, my title was Superintendent of Schools for the Diocese. Prior to that time, I served as Associate Superintendent of Schools from September 1, 1973, to June 30, 1976, and as Assistant Superintendent of Schools from October 1, 1966, to August 31, 1973.

4. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the operation of the Catholic elementary and secondary schools within the Diocese. There are 178 Catholic elementary schools and 24 Catholic secondary schools in the two counties that constitute the Diocese. The public schools in those two counties are under the jurisdiction of the New York City Board of Education.

5. In my position as Superintendent of Education for the Diocese of Brooklyn, I have become familiar with the

program of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in Kings and Queens Counties under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 99-10) (hereinafter "Title I"). According to information supplied by the New York City Board of Education, 12,913 students in 79 Catholic elementary and secondary schools in Kings and Queens Counties were eligible during the 1977-1978 school year, on the basis of economic and educational deprivation, to receive Title I services. Of the total eligible students, 7,726 actually received Title I remedial educational services during that school year.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the Catholic elementary and secondary schools in the Diocese of Brooklyn did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Diocese of Brooklyn, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), and Levitt v. Committee for Public Education, 413 U.S. 472 (1973), which invalidated programs

of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. - Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Diocese of Brooklyn, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. The Catholic elementary and secondary schools under my jurisdiction seek to provide above all, a sound education to their students so that those students can become useful, productive and concerned citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we insist that instruction in religion be a part of the regular school day and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

9. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators recognize that such a concern is not their exclusive province. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher should ignore the value implications of secular subject matter. So, in social studies programs in the public schools in New York City the question of the horrors of the

Holocaust is considered and involves both teachers and students in coming to a value judgment about the Nazi treatment of the Jews during World War II. When the question of slavery is taught in history classes concerned with the Civil War, students must also examine similar value questions about the treatment of Blacks in their own country. While religious instruction is given in all Catholic elementary and secondary schools which emphasizes the teachings of Roman Catholicism, the religious and moral values that are addressed in other subjects, particularly in those schools with a significant non-Catholic student population, are not simply Catholic but include more broadly Christian values in recognition of the Judeo-Christian heritage of this nation.

10. The concern for religion and religious values which is central to the philosophy of Catholic schools does not, however, dilute or distort the content of what would be considered secular, as opposed to religious, education courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

"Individual subjects must be taught according to their own particular methods. It would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man." The Catholic School, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition -- namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

11. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which includes at least the following courses: mathematics, reading, writing, English language, geography, United States history, civics, health education, physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students, when they leave school, are prepared to enter into the society with skills and knowledge comparable with other members of society.

b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described. We would be failing in our obligation as educators if we did not provide our students with the education necessary for them to be responsible and useful citizens.

12. Against this background of the general

educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address more specifically the nature of our Catholic schools, particularly Catholic schools whose students participate in the Title I program.

The Mission of Catholic Schools

13. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes is consistent with the religious mission of the Roman Catholic Church. However, that religious mission of the Roman Catholic Church is very broad in its scope. Our schools are aware that Jesus told his followers to teach all nations. Our schools have interpreted that command to mean that education -- both religious and secular -- is important to mankind, and they are seeking to fulfill that need. However, we also know that Jesus told us to "feed the hungry, give drink to the thirsty, clothe the naked." Thus the Roman Catholic Church offers services to those who are afflicted, assists those who are in need and comforts those who are unhappy, whatever their race or creed. The religious mission of the Catholic Church, therefore, includes both educational and social concerns.

14. The essential fact about Catholic elementary and secondary schools is that they are community-based -- that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community with geographical boundaries and which draws its students from the members of the community residing within those geographical boundaries. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of the community in which they exist.

These factors can and do affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the Diocesan level, covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and skills of its population. The religious mission of each Catholic parish is to meet the needs of its parishioners -- both educational and social -- as they are reflected in the needs and circumstances of the local population.

15. The eligibility requirements for student participation in Title I remedial education programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner city." To understand the mission of Catholic elementary and secondary schools whose students receive Title I services, it is essential to define the community that is being served and the mission which those parishes fulfill in operating schools in those communities.

16. Because they are located in inner-city communities, the Title I schools in Kings and Queens draw their students from a highly concentrated minority population. When those schools are located in such areas as Bedford-Stuyvesant, the population from which the students are drawn is overwhelmingly Black. It is a fact that a small minority of the American Black community is Roman Catholic. Consequently, Catholics constitute a minority of the total population of Bedford-Stuyvesant. Nevertheless, Catholic parishes in Bedford-Stuyvesant continue to operate elementary schools and, as a consequence now serve a student population that is approximately 40 percent non-Catholic.

17. While the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Diocese of Brooklyn has found it necessary over the past 13 years to provide an additional Diocesan subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. This subsidy is necessary because the parishes do not have sufficient funds to provide a full subsidy for the operation of their schools. Over the past 13 years, the Diocese of Brooklyn has contributed, in addition to the subsidies of each individual parish, a Diocesan subsidy amounting to almost \$11 million. Virtually all of the money has been used to defray deficits incurred by schools with Title I programs. In Bedford-Stuyvesant alone, where a significant number of non-Catholic youngsters are attending our schools, the Diocesan contribution to the operation of those schools has been over \$2 million.

18. It is evident that the religious mission which both parishes and the Diocese are fulfilling in the operation of these schools and for which the Diocese and parishes are expending such large sums of money relates to the educational, as well as the social, mission of the Catholic Church. Those parishes, with the support of the Diocese, have chosen to offer to the students of the inner city a value-laden educational program of high quality. The services are offered despite the fact that the number of Catholic students is not sufficient to fill these schools. Thus, the religious mission of the parishes in sponsoring those schools is a reflection of the educational and social needs of those communities and the educational and social concerns of the Roman Catholic Church.

19. One of the characteristics of the "profile" of the parochial schools discussed by the Supreme Court in its

decisions in Committee for Public Education v. Nyquist, supra, and Levitt v. Committee for Public Education, supra, is that those schools were "an integral part of the religious mission of the church sponsoring" them. If that element of the "profile" was intended to address the motivation of the Diocese of Brooklyn in maintaining schools with Title I programs that serve a significant non-Catholic student population, I have no quarrel with applying that description to the schools under my supervision with Title I programs. However, if that element of the "profile" is meant to suggest that those schools exist solely for narrow parochial or sectarian purposes, I would take issue with such a characterization of the schools under my supervision which have Title I programs on their premises. As I have just explained, the mission of the parishes sponsoring community-oriented schools with Title I programs is as much educational and social as it is religious.

Admissions Practices

20. Since meeting the needs of the communities in which they are located is an important element in the operation of our Catholic inner-city elementary schools and secondary schools, the admissions policies for these schools reflects that factor.

21. Because all of the schools under my supervision are supported, at least -- in part, by revenues of the parishes which sponsor them, preference in admission is given to children of those persons who provide the revenue to the parish -- namely, parishioners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children of parishioners.

22. However, once the needs of children of parishioners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Thus, the remaining seats are available to members of the community and reflect, therefore, the ethnic, cultural, economic and religious profile of that community.

23. The information regularly supplied to my office by individual schools does not show the religious composition of their student bodies. However, a special survey conducted at the request of counsel and completed in June 1976 collected such data for the 75 elementary and secondary schools in the Brooklyn Diocese that had Title I programs on their premises. I have no reason to believe that the figures revealed by the survey have changed significantly since the survey was conducted. The survey showed that the 75 schools had a total student population of 39,194. Of that enrollment, 2,889 students, or 7.4 percent of the total, were non-Catholic. The four schools of the Brooklyn Diocese with Title I programs that are located in Bedford-Stuyvesant and East New York, where there are large Black populations, had non-Catholic student enrollments of 41, 43, 48 and 58 percent, respectively. The enrollment in those schools, therefore, reflects to a significant degree the racial and religious composition of communities in which they are located. Similarly, one-third of the total enrollment in the four schools of the Brooklyn Diocese in South Jamaica and Springfield Gardens is non-Catholic. Again, those communities have a large Black population, and the number of non-Catholics in the four schools reflects the composition of those communities.

24. The preference for Catholic students in the admissions process is a natural consequence of our desire to

see that children of those who support the parish which supports the school should have free access to these schools. However, those schools are strongly community-oriented and admit students from all segments of the community after the needs of parishioners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, as is the case with many of the schools of the Brooklyn Diocese with Title I programs on their premises, the consequence of the admissions policies of those schools is to admit significant numbers of non-Catholics to be educated in those schools.

25. Another element of the "profile" of the parochial schools described in the Nyquist and Levitt decisions was that those schools "impose religious restrictions on admissions." As is evident from the statistics that I have referred to, the schools in the Brooklyn Diocese with Title I programs on their premises generally do not, as a matter of policy and practice, restrict admissions on religious grounds.

Curriculum

26. The curriculum offered in the elementary and secondary schools of the Brooklyn Diocese contains all of the secular courses prescribed by New York State law and also includes courses in religious instruction. In all courses offered in those schools, questions of religious and moral values are examined when they are relevant to the subject matter being taught. It is the inclusion of religious instruction as part of the regular curriculum and the value-oriented nature of that curriculum which, in my opinion, makes Catholic schools distinctive.

27. There are no religious restrictions on the

secular content of the secular subjects offered in the elementary and secondary schools of the Brooklyn Diocese. Those responsible for the education offered in those secular courses are committed to the search for truth, and are not restricted in that search by any religious restraints. The secular content of the secular courses has its own academic integrity, and it would be a gross distortion of the educational process of our schools to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church. Thus, our schools do not "impose religious restrictions on what or how the faculty may teach," as the Supreme Court assumed the parochial schools described in the "profile" in the Nyquist and Levitt decisions did.

28. It is true, of course, that there is not always a sharp line dividing the secular from the religious in the educational process. In the study of history, for example, a large part of the story of the development of western civilization is the story of the impact of Christianity on that civilization. Of necessity, therefore, the course in Western Civilization will touch upon the history of Christianity and upon the conflicts that have divided Christianity into various denominations and sects. The history teacher's objective and role in our schools is to present an objective account from the point of view of the discipline of history of those conflicts. If that objective account of the conflicts is inconsistent with an account offered by Roman Catholic theologians, any reconciliation of those inconsistencies, if there is to be a reconciliation, should be made by the theologian and not the history teacher, for it is the theologian who is most academically qualified to explain the points of difference on questions of faith and morals among the various Christian denominations.

29. Some of the secular subjects taught in the elementary and secondary schools in the Brooklyn Diocese, of necessity, touch upon questions of morals and values. While teachers are not restricted on how they treat those matters of morals and values, they are encouraged to address directly such matters and not shun them.

30. The teachers in the elementary and secondary schools of the Brooklyn Diocese do not engage in any effort to inculcate students in specific religious or moral values. The concept of "inculcation" is simply inconsistent with the educational process. That concept suggests, both in its connotations and literal definition, an effort to induce students to accept ideas or values through coercion. The schools under my supervision do not engage in that activity, whether religious values or other aspects of learning are involved. Thus, the schools under my supervision do not have "as a substantial purpose the inculcation of religious values," a characteristic attributed to the parochial schools in the Nyquist and Levitt decisions when the Supreme Court described the "profile" of those schools.

31. While our schools do not seek to "inculcate" religious values, they do make a conscious effort to make students aware of such values so that they will be better citizens. Many of the values that are addressed are expressed in the teachings of the Roman Catholic Church. However, many of those values -- such as justice, respect for the dignity of other persons and racial tolerance -- are also shared by other religious denominations and our society in general. The purpose of examining those values in all aspects of the curriculum where they are relevant is to bring students to an understanding of those values and, if they freely choose, a commitment to those values. Such an objective in no way differs from the efforts of the public

schools to bring their students to a free commitment to such values as patriotism, honesty and truth in their dealings with others. The study of the horrors of the Holocaust in the social studies program of the New York City public schools is specifically intended to show students that religious and racial intolerance is an evil to be abhorred. It is also intended to encourage the students to commit themselves to the values of tolerance, justice and concern for others in society. The explicit value orientation of the curricula in the schools of the Brooklyn Diocese has a similar objective.

32. I should also note that the values that are addressed in the curricula of the schools of the Brooklyn Diocese are not exclusively or narrowly religious in nature. For example, because those schools, including the schools with Title I programs, reflect the needs and aspirations of the communities in which they are located, the elementary and secondary schools of the Brooklyn Diocese which are located in communities with large ethnic populations will orient their curricula to take account of the ethnic concerns of the communities. Thus, a Diocesan school located in a predominantly Black community gives special attention to topics such as Black studies and Black history. Dealing with those ethnic concerns is as much a statement of values as including courses in religious instruction in the curriculum.

33. As I have previously mentioned, religious education is a regular part of the curriculum in the schools under my supervision. Parents who enroll their children in those schools, whether those parents are Catholics or members of some other religious faith, are told prior to enrollment that their children must participate in the entire curriculum of the schools, including that portion of the school day devoted to religious instruction.

34. In the Nyquist and Levitt decisions, the Supreme Court included as one element of the "profile" of parochial schools that they required students to "attend instruction in the theology and doctrine of a particular faith." While all students in the schools under my supervision are required to attend religious instruction, the content of that instruction is not as narrow or as limited as the Supreme Court suggested in those two decisions.

35. The focus of religious instruction offered in the schools of the Brooklyn Diocese is on the teachings of Christianity as the Roman Catholic Church understands those teachings. In the course of that instruction, teachings and beliefs that are peculiar to the Roman Catholic Church are examined and explained. Those who teach religious education classes are required to have a thorough understanding of those teachings and beliefs and are required to teach them accurately, not representing as Catholic doctrine something which is not.

36. However, the religious instruction offered in the schools of the Brooklyn Diocese is not limited or restricted to Catholic teaching or doctrine. The Roman Catholic Church is part of a broader Christian community, and many of its teachings and beliefs are shared by other religious denominations. Of necessity, therefore, much of what is taught in religious instruction is not narrowly sectarian in content. Moreover, our schools are conscious of the mandate from the Second Vatican Council to have respect for other Christian communities and to "joyfully acknowledge and esteem the truly Christian endowments from our common heritage" with other Christian churches. In the spirit of that mandate, the religious instruction offered in the schools in the Brooklyn Diocese, and particularly those schools with Title I programs and non-Catholics in the

student body, shows respect and sensitivity for the religious beliefs of all students, whatever those beliefs may be.

37. No effort is made in the religious instruction offered by the schools of the Brooklyn Diocese to compel any student, whether he is Catholic or of some other religious faith, to accept as valid or adhere to the teachings of the Roman Catholic Church. Indeed, any effort to do so would be in direct conflict with Roman Catholic teachings. One of those teachings is that faith is considered to be a gift of God to which each person must respond freely or not at all. It would be contrary to those teachings to attempt to compel any student to adhere to particular religious beliefs or to accept a faith to which he cannot freely subscribe. Thus, the schools under my supervision do not "require obedience by students to the doctrines and dogmas" of the Roman Catholic Church, as the Supreme Court suggested the parochial schools did in the Nyquist and Levitt cases.

38. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools of the Brooklyn Diocese for a variety of reasons. One of their motivations is that they themselves are strongly religious people -- whether they be Baptists or Muslims or Buddhists -- and they wish their children to be exposed to religious values as a part of their education. But they enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children. The schools of the Brooklyn Diocese would be defeating the expectations of those parents if they used the religious instruction or any other parts of the curriculum for purposes of proselytization or to compel the students to accept beliefs that they cannot in good conscience accept. Those schools would also be contradicting the

ecumenical teachings of the Second Vatican Council and denigrating the social mission of the Catholic Church in maintaining the schools in the inner city that are attended by a significant number of non-Catholics.

Religious Activities

39. Most of the elementary and secondary schools of the Brooklyn Diocese include some form of religious observance as part of the school day. Most typically, that religious observance would be in the form of a prayer recited at the beginning or end of the school day, or before instruction begins in a particular class. In addition, many schools will schedule on an occasional basis and during regular school hours more formal liturgical observances. All students enrolled in those schools are expected to be present during those religious observances, but the degree or extent to which they participate is a matter of their own consciences. There are, however, some religious activities in the schools, such as the reception of the Sacraments, in which non-Catholic students are not permitted to participate.

40. One of the characteristics of the parochial schools described in the Nyquist and Levitt decisions was that they required "attendance of pupils at religious activities." The schools in the Brooklyn Diocese engage in that activity to the extent that I have described.

41. Parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registering their children that the children will be expected to be present for the type of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that his child's participation in

those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

42. I have attempted in this affidavit to provide an accurate portrayal of the policies and practices of the elementary and secondary schools of the Brooklyn Diocese. I am aware that my description of the policies and practices of those schools is at odds with the description of parochial schools in the Nyquist and Levitt decisions and with many popular stereotypes of Catholic parochial schools. However, those stereotypes reflect a profound misconception of the purposes and educational programs of the schools under my supervision.

43. Those stereotypes seek to portray Catholic parochial schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or of compelling them to subscribe to the beliefs of the Roman Catholic Church. While the schools of the Brooklyn Diocese do serve religious functions and do have religious objectives, they do not have the extreme characteristics that the stereotypes attribute to them.

44. The basic objective of the elementary and secondary schools in the Brooklyn Diocese, including those with Title I programs, is to provide their students with a sound education in an environment in which they are exposed to religious education and religious and moral values. Our goal is to produce students who have the knowledge and intellectual skills to be useful and productive members of their communities and who are also aware of the religious dimension of man.

[Vincent D. Breen]

REVEREND VINCENT D. BREEN

Subscribed and sworn to before me
this 22nd day of March, 1979.

Notary Public

My Commission expires:

Catherine D. Dumphy

Notary Public, State of New York

No. 41-4506593

Qualified in Queens County

Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND
RELIGIOUS LIBERTY, FLORENCE FLAST, HELEN
HENKIN, HAZEL SMITH, DENISE KROUSER and
CHRISTINA WALKER,

Plaintiffs,

-against-

88 Civ. 96 (JG)

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, COMMISSIONER OF EDUCATION OF
THE STATE OF NEW YORK and CHANCELLOR and
BOARD OF EDUCATION OF THE CITY OF NEW
YORK,

Defendants,

-and-

RACHEL AGOSTINI, et al. and LEAH SAYS, et al.,

Defendant-Intervenors.

AFFIDAVIT OF CATHERINE HICKEY

Catherine Hickey, being duly sworn, proposes and
says:

1. I am the Superintendent of Schools of the
Roman Catholic Archdiocese of New York. I have been
Superintendent of Schools since 1989. My administrative
responsibilities include overall supervision of the elementary
and secondary parochial schools in the counties of
Richmond, New York, Bronx, Westchester, Putnam,
Dutchess, Rockland, orange, Ulster and Sullivan.

2. I make this affidavit with the understanding that it will be submitted to the Court in connection with the cross-motions for summary judgment in this case.

3. I have reviewed the affidavit that was executed by Monsignor John J. Healy on March 22, 1979 and submitted to the United States District Court for the Southern District of New York in National Coalition for Public Education and Religious Liberty, et al. v. Califano (76 Civ 888). I understand that affidavit was subsequently made part of the record in this Court in Felton v. Califano (Docket No. 78C 1750) -- the case that was subsequently decided by the United States Supreme Court under the name Aguilar v. Felton, 473 U.S. 402 (1985). A copy of that affidavit is attached hereto as Exhibit A.

4. Some of the statistical information contained in Msgr. Healy's 1979 affidavit is no longer current. Today there are 144 Catholic elementary schools and 39 Catholic secondary schools serving approximately 77,000 students in the counties of New York, Bronx and Richmond. A total of 9,463 students from 98 of those schools received services under Chapter 1 during the 1993-94 school year. Those 98 schools have a total student population of approximately 41,000, of whom 27.5 percent are non-Catholic. The non-Catholic student enrollment in 18 of the 98 schools whose students receive Chapter 1 is more than 50 percent, and in particular schools the non-Catholic population is as high as 75 and 85 percent. We do not have records that would show the percentage of those who receive Chapter 1 services who are non-Catholic, but there is no reason to believe that that percentage is materially different from the non-Catholic population in the schools those students attend.

5. With the exception of statistics that are out-of-

date, the information contained in Msgr. Healy's 1979 affidavit remains true today. In particular, I agree with Msgr. Healy's, general description of the Catholic schools whose students receive Chapter 1 [then Title I] services, and with his comparison of those schools to the profile contained in certain of the Supreme Court's decisions.

6. I understand that the plaintiffs in this case have maintained that the "purpose and effect" of the current Chapter 1 program in New York "is to keep alive religious schools in this City by subsidizing a substantial portion of their general education program," that the "vast majority" of church-related schools in the city "might not exist today" without Chapter 1 assistance, and that unless Chapter 1 funding is increased these schools "are not likely to continue to exist, at least as schools with a general educational program." Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pl. Mem."), at 58. These assertions are completely inaccurate insofar as the Catholic schools in the Archdiocese are concerned. Chapter 1 funds are not given to the schools themselves, but are received by the New York City Board of Education and disbursed for the benefit of economically and educationally deprived school children. Those funds do not, directly or indirectly, subsidize any portion of the general educational program of the schools of the Archdiocese. The services that are provided to students under Chapter 1 are supplemental to the general educational services provided by the schools, and they are provided only to educationally disadvantaged students, not to the general population of students. They have not replaced any educational services that were previously offered by the Catholic Schools in the Archdiocese. As noted in Msgr. Healy's 1979 affidavit (at 6), the Catholic elementary and secondary schools in the Archdiocese did not provide the types of remedial

educational services available under Chapter 1 prior to the commencement of the Title I program in New York in 1966. If these services were to become unavailable under Chapter 1 -- or if additional restrictions were to be imposed that made it more difficult for students to receive those services -- the consequence would be that students would go without these important remedial services. The Catholic schools in the Archdiocese would not have the financial resources to provide the same services. The unavailability of those services would obviously impair the academic progress of some of the students in our schools, but it would not have any material effect on the financial condition of the schools themselves.

7. The Catholic Schools in the Archdiocese are under financial pressures, as are all schools. But those pressures are not relieved by Chapter 1 funding, because that funding does not flow to the schools and does not relieve the schools even indirectly of any financial burden that they would otherwise bear. Moreover, the financial pressures under which we operate do not pose a threat to the existence of our schools. Those schools are financially stable and enjoy the broad support of their local parishes and communities. They will continue to enjoy that support, I believe, as long as they continue to provide young girls and boys with a quality education in a disciplined and supportive setting.

[Catherine Hickey]
Catherine Hickey

Subscribed and sworn to before
me this 31st day of May, 1995.

Notary Public

My Commission Expires: 1/13/96

Richard E. Barnes

#02BA4990734

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL COALITION FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY, et al.,

Plaintiffs,

V.

76 Civ. 888 (CHT)

JOSEPH A. CALIFANO, Secretary	AFFIDAVIT OF
of the United States	REVEREND MONSIGNOR
Department of Health, Education	JOHN J. HEALY
and Welfare, et al.,	

Defendants

and

JAMES and BESSIE BOVIS, et al.,

Intervenor-Defendants,

and

PHILIP and IDA FENSTER, et al.,

Intervenor-Defendants

STATE OF NEW YORK)	
)	ss:
COUNTY OF NEW YORK)	

REVEREND MONSIGNOR JOHN J. HEALY, being

duly sworn, deposes and says:

1. I am the Secretary of Education and Director of the Department of Education of the Roman Catholic Archdiocese of New York. My administrative responsibilities include overseeing the education of 140,630 students in the Catholic elementary and secondary schools in the Counties of Richmond, New York, Bronx, Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan.

2. I make this affidavit on behalf of the several defendants in this matter, with the understanding that it will be submitted to the Court as part of the joint exhibits to be filed by the several defendants.

3. I have been Secretary of Education of the Archdiocese of New York since August 1, 1978. From January 1, 1976, to July 31, 1978, I served as Deputy Secretary of Education. Prior to 1976, I served as Associate Secretary of Education.

4. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the operation of the Catholic elementary and secondary schools within the Archdiocese. There are 287 Catholic elementary schools and 69 Catholic secondary schools in the ten counties that constitute the New York Archdiocese. Of that total number of schools, 159 Catholic elementary schools and 48 Catholic secondary schools are located in the Counties of New York, Bronx and Richmond, counties within the Archdiocese for which the New York City Board of Education has responsibility for the operation of the public school system. Approximately 95,698 students are enrolled in the Catholic elementary and secondary schools in those three counties.

5. In my position as Secretary of Education of the Archdiocese of New York, I have become familiar with the programs of remedial education made available through the New York City Board of Education to economically and educationally disadvantaged children who attend nonpublic schools in New York City under Title I of the Elementary and Secondary Education Act of 1965 (Pub. L. No. 89-10) (hereinafter "Title I"). According to information compiled by the New York City Board of Education for the 1977-1978 school year, 15,109 students attending 97 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island were eligible, on the basis of economic and educational deprivation, to receive Title I services during that school year. Of the eligible Title I students in those schools, 7,781 actually received Title I remedial services.

6. Prior to the commencement of Title I remedial services for nonpublic school students in New York City in 1966, the Catholic elementary and secondary schools in the Archdiocese of New York did not have the financial resources to provide to economically and educationally disadvantaged students any of the types of remedial educational services presently available under Title I. If, for any reason, those Title I remedial educational services were no longer available to qualified students in the Catholic elementary and secondary schools in the Archdiocese of New York, the schools themselves would not have the economic resources to provide the services on their own.

7. I have reviewed several decisions of the United States Supreme Court deciding the constitutionality of public aid programs benefiting church-related elementary and secondary schools and the descriptions of those schools contained in those opinions. In particular, I have examined the decisions in Committee for Public Education v. Nyquist,

413 U.S. 756 (1973), and Levitt v. Committee for Public Education, 413 U.S. 472 (1973), which invalidated programs of aid to church-related schools and their students enacted by the New York Legislature. Each of those decisions contained what the Court identified as a "profile" of church-related elementary and secondary schools in New York State. Based on my review of those decisions and my knowledge of the Catholic elementary and secondary schools in the Archdiocese of New York, I can state that the "profile" of the church-related elementary and secondary schools recited in those opinions does not accurately describe the Catholic elementary and secondary schools under my supervision which have Title I programs under the auspices of the New York City Board of Education.

General Observations

8. Before addressing the specific elements of the "profile" contained in the Nyquist and Levitt decisions, a few general observations about the Catholic elementary and secondary schools under my supervision are appropriate. The focus of the general and specific observations which follow is on those Catholic elementary and secondary schools which have Title I programs. Because those schools are located in the inner city and have significant non-Catholic student populations, they have characteristics that defy stereotyping.

9. The underlying objective of the Catholic elementary and secondary schools under my supervision is to provide a sound education to their students so that those students can become responsible, productive and moral Citizens. While the public schools have a comparable central objective, our schools are distinctive from the public schools in that we add to an otherwise complete education

instruction in religion, and that we consciously and explicitly address questions of morals and values when those questions are relevant to the subject matter being taught.

10. A concern for religion and religious values has always been central to the Catholic philosophy of education. However, Catholic educators are aware that such a concern is not theirs exclusively. Much of what is taught to students in the elementary and secondary grades, wherever they attend school, is value-laden, and no conscientious teacher can ignore the value implications of what might otherwise be considered a secular subject matter. For example, any treatment in a social science class of the civil rights movement of the past 20 years involves the teacher in forming a value judgment on the dignity of individual persons. The "religious" values that are addressed in Catholic elementary and secondary schools, and particularly those with a significant non-Catholic student population, are not narrowly parochial or sectarian in nature, but rather more broadly Christian in recognition of the Judeo-Christian heritage of this nation. Our schools also constantly stress moral, as distinct from precisely religious, values. These include responsibility, tolerance, brotherhood, thoughtfulness and studiousness.

11. The concern for religion and religious values which is central to the philosophy of Catholic schools in no way dilutes or distorts the content of what would be considered secular, as opposed to religious education, courses. Indeed, a document issued in 1977 by the Vatican's Sacred Congregation for Catholic Education admonished Catholic educators as follows:

"Individual subjects must be taught according to their own particular methods. It would be

wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics. They enable the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes, all of which help to develop his personality and lead him to take his place as an active member of the community of man." The Catholic School, § 39 (a document issued by the Sacred Congregation for Catholic Education, March 19, 1977).

The Catholic schools under my supervision have consistently adhered to that proposition -- namely, that secular subject matter has its own integrity and must be taught without distortion or intrusion of religious concerns not relevant to the subject matter.

12. There are two fundamental reasons why Catholic elementary and secondary schools under my supervision offer a separable secular education, along with the religious instruction that is provided.

a. We are obligated under the provisions of the New York State Education Law to offer a curriculum which offers at least the following courses: mathematics, reading, writing, English language, geography, U.S. history, civics, health education, physical education, New York State history, science and safety education. We are also obligated to provide our students in those courses with a body of knowledge comparable to that provided the students in the public schools in the state so that our students can perform satisfactorily on standardized tests provided by state officials to

both public and nonpublic school students.

b. Even in the absence of those obligations imposed by state law, however, our schools would still provide a curriculum of the type described above. The obligations of our schools extend far beyond the religious needs of our students -- they extend to their temporal requirements. We would be failing in our obligations as educators and would have no right to sponsor schools if we did not provide our students with that education which is necessary for them to be responsible and productive citizens.

That Catholic schools teach secular subjects both objectively and well is attested by the readiness of public and private high schools, colleges and universities to admit graduates of those schools.

13. Against this background of the general educational philosophy of the Catholic elementary and secondary schools under my supervision, it is appropriate to address the specific characteristics of the "profile" of those schools which the Supreme Court used to decide the Nyquist and Levitt cases.

Religious Mission

14. One of those characteristics is that the schools that the Court was examining were an integral part of the religious mission of the church sponsoring it." While the words quoted are, standing alone, unobjectionable as a description of the motivation of many persons who sponsor our schools, they are misleading in the inferences that the Supreme Court drew from them as a characteristic of the

educational process of Catholic elementary and secondary schools. They are especially misleading for the Catholic schools that have Title I programs provided by the New York City Board of Education.

15. It cannot be denied that any enterprise undertaken by the Roman Catholic Church is religiously motivated. Thus, the operation of elementary and secondary schools by parishes and a diocese is consistent with that generosity which is central to the mission of the Roman Catholic Church and mandated by its Founder. But so is the care of the hungry or the ill-housed, and motivation in no way clouds or dilutes such assistance. The difficulty lies in defining the precise nature of that religious mission relative to educating children in need of remedial instruction.

16. In this regard, a central fact about Catholic elementary and secondary schools is that they are community based -- that is, the overwhelming number of those schools are sponsored by a parish which is located in a particular community and which draws its students from that community. Those schools of necessity, therefore, reflect the ethnic, cultural, economic and religious profile of their communities. These factors can, do and should affect the educational philosophy and practice of each school. And, while general policies and goals are set forth at the diocesan level covering such diverse matters as health and safety regulations and curriculum content, how those policies and goals will be implemented by each school depends on the needs and the skills of its population. Indeed, in many of the schools in the Archdiocese, those policies and goals are implemented by parish school boards that are composed of the parents of students, who in Title I schools include a number of non-Catholics.

17. The eligibility requirements for student participation in Title I remedial programs are such that those programs will be found only in those Catholic elementary and secondary schools that are in that portion of the metropolitan area which we have come to call the "inner city." That fact, which is essential to understanding the work of Title I Catholic elementary and secondary schools, necessarily defines the educational mission of the schools which is in no way compromised by the religious motivation that is the foundation of the desire to serve the ill-educated, as much as it is to serve the ill-fed.

18. Because they are located in inner-city communities, the Title I schools in Manhattan, the Bronx and Staten Island draw their students from highly concentrated minority populations. When those schools are located in certain areas in the inner city, the population from which the students are drawn is overwhelmingly Black and contains a large number of non-Catholics. The majority of the students attending several Catholic elementary schools in areas with large Black populations are not of the Roman Catholic faith.

19. Moreover, while the responsibility for financing the operation of elementary schools rests with the parish or parishes sponsoring those schools, the Archdiocese has found it necessary over the past seven years to provide a subsidy to inner-city schools with significant non-Catholic student bodies to keep them in operation. The Archdiocesan Commission for inter-Parish Financing has distributed approximately \$2.5 million each year, principally to parishes which operate schools with Title I programs. Ninety percent of the money has been used to defray deficits incurred by the Title I schools. In the 41 elementary schools receiving funds from the Commission for Inter-Parish Financing, there are

16,245 students, of which 2,623, or approximately 16 percent, are non-Catholic. In addition, the Archdiocese has an Inner City Scholarship Fund which has awarded scholarships exclusively to students at 56 inner-city schools with Title I programs in Manhattan and the Bronx. During the 1978-1979 academic year, some \$300,000 was provided by that Fund for tuition subsidies for students in those Title I schools.

20. In light of the fact that there are substantial diocesan subsidies to inner-city Title I schools with significant non-Catholic student bodies, a question arises as to what "religious" mission the Archdiocese is fulfilling in maintaining such schools. The answer is clear to those who understand the deep concern that the Catholic Church, in general, and Catholic educators, specifically, have for those people who are victims of economic deprivation, whether they are Catholic or not. The mission is one of social and community action, which is reflected in the willingness of the Catholic Church to divert its resources from strictly religious activities to aid those who are the victims of social, economic and cultural disadvantage or racial discrimination. A long-standing mission of the Roman Catholic Church has been to alleviate the effects of social injustice, and that mission is fulfilled in part by the continued operation of inner-city Title I schools for the benefit of the community, irrespective of whether those schools serve a predominantly Catholic population.

Obedience to Doctrines and Dogmas

21. Another of the characteristics of the "profile" of Catholic elementary and secondary schools contained in the Nyquist and Levitt decisions is that they "require obedience by students to the doctrines and dogmas" of the

Catholic faith. I can state unequivocally that no Catholic school under my supervision has any such purpose or serves any such function.

22. While the religious education provided by Catholic elementary and secondary schools reflects a concern that students receive, in their normal educational setting, an exposure to the teachings of the Roman Catholic Church and Christianity in general, it is not the function of a school to compel its students to believe anything, religious or otherwise. The purpose of a school is strictly to provide its students with the information and means of analysis so that they can come to a better understanding of the subject matter, whether that subject matter is religious or secular in nature. Our schools would be untrue to their functions as educational institutions if they sought to compel students to accept one religious viewpoint or another, just as they would be shirking their responsibility if they compelled the students to accept one interpretation of Shakespeare rather than another or one explanation for the American Civil War rather than another.

23. Our schools would not only diminish their standing as quality educational institutions if they sought to compel obedience of students to the doctrines and dogmas of the Roman Catholic Church. They would also be acting contrary to the very doctrines of that Church. A central principle of Roman Catholic theology is that religious faith must be freely given and freely accepted. Under that precept, nothing may be done by the Church, or anyone acting on its behalf, that would seek to coerce the conscience. Thus, those responsible for the operation of Catholic elementary and secondary schools would be untrue to their own beliefs if they sought to compel the students to obey the doctrines and dogmas of the Church.

Inculcation of Religious Values

24. A third characteristic of the "profile" schools in the Nyquist and Levitt decisions was that they had "as a substantial purpose the inculcation of religious values." That characteristic is neither a purpose nor a function of the Catholic elementary and secondary schools under my supervision.

25. The word "inculcate" has connotations which are inconsistent with the educational process. It suggests both in its connotations and literal definition an effort to induce students to accept ideas or values through coercion. Our schools do not engage in that activity, whether religious values or other aspects of learning are involved.

26. By denying that our schools "inculcate" religious values, I do not mean to suggest that exposure of students to religious values is in any way foreign to our schools or our educational program. Our schools have as a central concern that students be aware of Catholic values and examine those values critically. That concern is expressed not only in our religious education classes, but also in our practice of examining the relationship of religious or moral values to the entire learning process where such values are relevant to the subject matter. But we do not seek to force our students to adopt religious values that they cannot or do not freely accept.

Admission Requirements

27. A further characteristic of the "profile" schools in the Nyquist and Levitt decisions is that they "impose religious restrictions on admissions." The Title I Catholic elementary and secondary schools under my

supervision do not operate under any such restrictive admissions policy.

28. Because most of the schools under my supervision are supported by the revenues of the parishes which sponsor them, preference in admissions is given to children of those persons who provide revenue to the parish - namely, parishioners who contribute regularly to the parish. Because of that policy, first preference for available places in the schools under my supervision would be given to the children of those Catholic parents.

29. However, once the needs of the children of parishioners are met, remaining spaces at the school are open without consideration to the religious affiliation of the student or of his parents. Indeed, the prevailing policy is to give preference, after the needs of children of parishioners are met, to others living within or close to the geographical boundaries of the parish. By definition, the second level of preference is for students who are not of the Catholic faith.

30. That these policies do not restrict admissions on religious grounds is most dramatically illustrated by the Title I Catholic elementary and secondary schools under my supervision. Of the approximately 34,000 students enrolled in the 79 Catholic elementary and secondary schools in Manhattan, the Bronx and Staten Island which have Title programs on their premises, approximately 14.7 percent are of a religious faith other than Catholic. The percentage of non-Catholic students in the Title I schools is even higher in those areas with predominantly Black and Asiatic populations. For example, several Title I schools serving those communities have student populations that are more than 60 percent non-Catholic.

31. The predominance of Catholic students in the enrollment statistics is a natural consequence of our desire to see that children of those who support the parish, which supports the school, should in equity have free access to those schools. However, those schools remain community-based and welcome all members of the community to the school when the needs of parishioners have been satisfied. Whenever the community in which the school is located has a significant non-Catholic population, the consequence of our admissions policy is to invite significant numbers of non-Catholics to be educated in our schools.

Faculty Hiring Policies

32. Another aspect of the "profile" schools described in the Nyquist and Levitt decisions is that they impose "religious restrictions on faculty appointments." To my knowledge, teaching positions in the Catholic elementary and secondary schools under my supervision are not restricted to Roman Catholics. Hiring is a responsibility of the individual schools; the Archdiocesan office serves simply as a clearinghouse for applicants who are seeking teaching positions in the Catholic elementary and secondary schools. The Archdiocesan school office retains a file of applications, and the names of qualified applicants are made available to individual schools as teaching positions become available.

33. The teacher application form currently used by the Archdiocese requests information concerning the religious affiliation of the applicant. No application is rejected and no applicant is denied referral to a school because he or she is of a religious faith other than Roman Catholic.

34. Individual schools have broad latitude in

deciding whether or not to hire an applicant referred to them by the Archdiocesan school office. Under Archdiocesan policies, no applicant is referred who does not have sound academic qualifications, a matter of primary consideration. As a matter of Archdiocesan policy and practice by individual schools, no person will be hired for a teaching position if he or she is openly hostile to the Roman Catholic Church or its belief system. Barring such aggravated sentiments, non-Catholic applicants experience no discrimination in the hiring process. In the employment interview, all applicants are made aware of and asked if their consciences would allow them to cooperate with the policies of the school, the religious education program, value education and the general Catholic atmosphere of respect for each other, for learning and for God.

35. I am aware that there are teachers employed by Catholic elementary and secondary schools under my supervision who are not Roman Catholics. This is particularly true in schools with significant numbers of Black students, where role models are important and where there are very few Black Catholics with the requisite academic qualifications to draw from. The precise number of non-Catholics teaching in Archdiocesan schools is difficult to determine because the school census cards received by my office do not classify teachers by religious affiliation. However, an inquiry of a random sample of Title I schools revealed that 15 non-Catholics were teaching in the schools contacted, and I am aware that is not the total number of non-Catholic teachers in our system. For example, I know that 20 of a total of 359 lay teachers employed by Archdiocesan high schools are not Catholic. Unlike parish elementary schools, the direct administration of those high schools is a function of the Archdiocesan office. These statistics amply demonstrate that the schools of the

Archdiocese do not restrict the hiring of teachers on religious grounds.

Religious Restrictions on Course Content

36. Another feature of the "profile" schools in the Nyquist and Levitt decisions is that they "impose religious restrictions on what or how the faculty may teach." That characteristic does not accurately describe the Catholic elementary and secondary schools under my supervision.

37. The emphasis in the religious education classes in the overwhelming majority of the schools under my supervision is on the teachings of Christianity as the Roman Catholic Church formulates them. Those responsible for teaching the religious education classes must have a thorough understanding of the teachings of the Roman Catholic Church and are required to teach them accurately, not presenting anything as Catholic doctrine which is not factually so. This restriction, however, does permit and indeed encourages those responsible for religious education to explain the positions taken by other Christian denominations or other religious faiths on particular issues that are within the purview of the religious education curriculum.

38. There are no religious restrictions on the secular content of the secular subjects offered in the Catholic elementary and secondary schools under my supervision. The secular content of those secular courses has its own academic integrity, and it would be a gross distortion of the educational process to restrict the secular content of those courses because of the religious beliefs of the Roman Catholic Church.

39. It is true, of course, that in the educational process there is not always a sharp line dividing the secular from the religious. In history, for example, a large part of the story of the development of Western civilization is the story of the impact of Christianity on Western civilization. Of necessity, the course in Western Civilization will touch upon the conflicts that divided the Christian Church into various denominations and sects. If the historian's objective account of the precise points of conflicting theological dogma is inconsistent with the Roman Catholic theologian's account, the reconciliation, if there is to be one, should be made by the theologian and not the teacher of history. However, the teacher who must include an historical account of the Reformation in a class in one of the schools under my supervision would be expected to give the account that is most consistent with the best available historical materials and not necessarily the account that is consistent with a Roman Catholic theologian's view of the Reformation.

40. Some of the secular subjects taught in the schools under my supervision also touch upon questions of morals and values. Teachers are not restricted on how they approach such subject matter, but are encouraged to expose students to the moral and value dimension of the subject matter within a Christian framework and not to shun those issues.

Attendance at Religious Instruction

41. An additional feature of the "profile" schools in the Nyquist and Levitt decisions is that they "require pupils to attend instruction in the theology or doctrine of a particular faith." It is true that all students enrolled in the schools of the Archdiocese take a course in religion as a part of the Curriculum. However, to the extent that this

characteristic of the "profile" implies that the content of the religious instruction offered is narrowly sectarian in content or is taught to compel adherence by students to particular religious beliefs, it does not accurately portray the schools under my supervision.

42. As previously explained in this affidavit, courses in religious education are a regular part of the curriculum of the schools under my supervision and the emphasis in those courses is on the teachings of Christianity as the Roman Catholic Church formulates them. Parents of children who are not members of the Roman Catholic faith are informed of these features of the curriculum prior to enrollment.

43. The religious instruction offered in the schools under my supervision is not limited to the specific doctrines and dogmas of the Roman Catholic Church, although religious teachings and beliefs that are peculiar to the Roman Catholic Church are explained to the students. However, the Roman Catholic Church is part of a much broader Christian community, and the religious instruction in the Archdiocesan schools includes much of what the Roman Catholic Church shares with other Christian denominations. In addition, religious teachings of other denominations that conflict with Roman Catholic teachings are explained to students so that they will have a better understanding of the nature of religious belief.

44. Moreover, a central goal of the religious instruction program is to show students the importance and value of services to others. Thus, as an extension of the religious instruction program, students are encouraged to participate in tutoring younger students, visiting elderly persons who are shut-in or hospitalized, and activities such

as Red Cross Walk-a-Thons and the Cerebral Palsy reading program.

45. No effort is made in the religious education courses offered by the schools under my supervision to compel any student, whether Catholic or of some other religious faith, to accept as valid or to adhere to the beliefs of the Roman Catholic Church. Those beliefs are explained and explored in the religious education classes in the same manner that other subject matter taught in those schools is explained and explored, and students are free to accept or reject those beliefs according to their own consciences.

46. Parents of children who subscribe to a religious faith other than the Roman Catholic faith enroll their children in the schools under my supervision for a variety of reasons. One of their motivations is that they themselves are strongly religious people -- whether they be Baptists or Muslims or Buddhists -- and they wish their children to be exposed to religious values. They enroll their children in Catholic elementary and secondary schools at considerable expense to themselves, and their primary objective is to obtain a sound education for their children and not because they want their children exposed to any proselytizing efforts by the schools. In confirmation of this fact, to my knowledge there has never been an instance of a non-Catholic student removed from a Catholic elementary or secondary school because the student was forced to believe or engage in a religious practice in violation of that student's own conscience or belief system.

Attendance at Religious Activities

47. A final characteristic of the "profile" schools in the Nyquist and Levitt decisions is that they "require

attendance of pupils at religious activities." The Catholic elementary and secondary schools under my supervision engage in that practice. However, non-Catholic students are not permitted to participate in some religious activities, such as reception of the Sacraments.

48. Most of the Catholic elementary and secondary schools under my supervision have some form of religious observance as part of the school day. Most typically, that religious observance will be in the form of a prayer recited at the beginning or the end of the school day, or before instruction begins in a particular class. In addition, during regular school hours on an occasional basis most schools will schedule more formal liturgical observances, such as attendance at Mass by a class or the entire school. All students enrolled in the schools are expected to be present for such religious observances, but the degree or extent to which they participate in those observances is a matter of conscience for the individual student, and that freedom of conscience is scrupulously observed by teachers.

49. The parents of students who subscribe to a religious faith other than the Roman Catholic faith are told prior to registration that their children will be expected to be present for the types of religious observances that I have described. To my knowledge, no parent of a student who is of a religious faith other than the Roman Catholic faith has complained that the student's participation in those religious observances has in any way compromised the student's own religious beliefs or practices.

Conclusion

50. I have attempted in this affidavit to describe

accurately the policies and practices of the Catholic elementary and secondary schools under my supervision as they relate to the various characteristics of the "profile" schools that the Supreme Court described in the Nyquist and Levitt decisions. As the information I have supplied should make clear, the schools under my supervision depart significantly from the schools of the "profile." That is particularly true of those schools which have Title I programs under the auspices of the New York City Board of Education -- schools which have a significant number of non-Catholic students.

51. By distinguishing those schools from the characteristics of the "profile" schools, I do not intend to deny that those schools serve religious functions or have religious objectives. However, where the "profile" attempts to portray such schools as having a singular and overriding objective of indoctrinating students in the Roman Catholic faith or compelling them to subscribe to the beliefs of the Roman Catholic Church, the "profile" distorts and misstates the total educational mission of those schools.

52. The basic objective of the Catholic elementary and secondary schools under my supervision, including those with Title I programs, is to provide their students with a sound education in an environment in which the students are exposed to religious education and religious values. Our goal is to produce students who have the knowledge and intellectual skills to be responsible and productive members of their communities and who are also aware of the religious heritage of our society.

[John J. Healy]

REVEREND MONSIGNOR JOHN J. HEALY

Subscribed and sworn to before
me this 22 day of March, 1979.

Notary Public

My Commission expires:

Josephine Raymond
Notary Public, State of New York
No. 31-8505425
Qualified in New York County

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN, BARBARA
HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN
H. ZELON,

**REPLY
DECLARATION**

78 CV-1750 (JG)

Plaintiffs,

against -

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION and
CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

MARGARET O. WEISS, declares, pursuant to 28
U.S.C. § 1746, under penalty of perjury under the laws of
the United States of America, that the following is true and
correct:

1. I am the Director of the Bureau of Nonpublic
School Reimbursable Services of the Board of Education of
the City School District of the City of New York. I submit

this declaration in reply to plaintiffs' opposition to defendant Chancellor of the Board of Education of the City of New York's motion for relief from the judgment in this action, and in further support of the Chancellor's motion.

Public School Sites and Space Limitations

2. As noted by plaintiffs' counsel, Stanley Geller, in his declaration dated December 26, 1995 (hereafter "Geller Decl.") (at paragraph 19), when the post-Aguilar plan was developed in the spring of 1986 to comply with this Court's judgment, the Board of Education of the City School District of the City of New York (hereafter the "Board of Education" or the "Board") was able to offer services in public school sites to the Chapter 1 students in 80% of the participating private schools, or 194 of the 242 participating private schools. The term "private school," as used herein, refers to schools which are affected by the judgment in this case.)

3. However, of these 194 private schools, the parents and principals of only 52 private schools accepted the offered public school sites. Thus, only 3,578 private school students received Chapter 1 services at public school sites during school year 1986-1987. As discussed in my Declaration of October 16, 1995 in support of the Chancellor's motion (hereafter "Initial Weiss Decl.") (at paragraph 32), the primary reasons given for declination of the public school sites were the loss of classroom instructional time caused by travel time between the private and public school sites, and concerns regarding safety during transit between the private and public school sites.

4. Even in the 1986-87 school year, there was insufficient space in the public schools to accommodate all

private school students who had been receiving Chapter 1 services. Accordingly, 70 Mobile Instructional Units were obtained to provide additional sites for Chapter 1 services for private school students. Further, 13 Leased Sites were obtained which also provided additional space for Chapter 1 services.

5. However, during the 1986-1987 school year, the use of these three methods of service delivery resulted in only 10,661 private school students from 141 private schools receiving Chapter 1 services in New York City. This was an enormous decrease in the number of private school students served. During the 1985-1986 school year (the final year in which the Board provided Chapter 1 services to private school students by sending its teachers and other professional staff into the private schools) 20,965 students from 247 private schools received Chapter 1 services in New York City. Accordingly, 10,304 fewer private school students received Chapter 1 services in New York City after the post-Aguilar plan was implemented. This represents a decrease of approximately 50% in the number of private school students served by Chapter 1.

6. This loss of services for 10,304 students, who were in need of remedial education because of below grade educational achievement, and who resided within defined poverty areas, was an educational tragedy. Accordingly, the Board of Education worked to develop and expand the other methods of service delivery -- Computer Assisted Instruction, Mobile Instructional Units and leased sites -- which are now used to provide Chapter 1 services for private school students (in addition to public school sites). Over the intervening years, the use of these three other service delivery methods has resulted in the restoration of the participation level of private school students in the Chapter

1 program to approximately the pre-Aguilar level; in school year 1993-1994, the Board of Education provided Chapter 1 services to 21,795 students from 257 private schools.

7. Further, as is thoroughly described in the January 1995 Report of Alan G. Hevesi, Comptroller of the City of New York, Overcrowding in New York City Public Schools: Where Do We Go from Here? (the report is annexed as Exhibit "7" to the Initial Weiss Decl., see also paragraphs 35-38 of the Initial Weiss Decl.), since 1989, there has been an explosive growth in public school enrollment in the City of New York, which has led to severe overcrowding in the public schools. The public school population has grown 10%, from 940,208 students to 1,034,235 students, in the eight year period from October 1986 to October 1994. As a result, the public school system is now so crowded that 90,000 students, which is 9% of the public school population, lack regular classroom seats.

8. As a result of the severe overcrowding, the Board of Education has lost 23 of the public school sites that it used for Chapter 1 services for private school students in the early years of the post-Aguilar Chapter 1 program. Thus, the availability of public school sites for the provision of Chapter 1 services to private school students is significantly less now than it was in 1986, when the post-Aguilar plan was first developed. Nor is the situation likely to improve. The Comptroller finds that there is insufficient time and, due to the current budget problems, insufficient funds, to build enough new public school facilities to meet the need for increased public school space. Further, based on studies of patterns of birth rates and immigration, it is projected that the current extraordinary growth rate (an increase of approximately 20,000 students per year) will continue into the next decade, and that the severe

overcrowding situation will get even worse. The projection is that the enrollment in the New York City public schools will increase by over 240,000 in the nine years between 1993 and 2002. In 2002, the projected total public school enrollment will be over 1,256,000. (Exhibit "7" to the Initial Weiss Decl. pp. ES-1, 23-27, 36).

9. Plaintiffs' counsel asserts that notwithstanding this severe overcrowding situation, the Board of Education should serve all private school students receiving Chapter 1 services at public school sites, and then suggests that this can be done by utilizing the same methods to reduce overcrowding for public school students proposed in the Comptroller's Report. (Geller Decl., paragraph 20).

10. First, as the Comptroller's Report makes clear, the principle proposed methods to relieve overcrowding for public school students -- building new schools or expanding existing schools (Exhibit "7" to the Initial Weiss Decl., pp. 26-27, 36, 51), bussing students to schools which are often far from their homes (Exhibit "7," pp. 30-35), "double shifting" (having the student population attend school on two different schedules during the day) and changing to a year-round school calendar (Exhibit "7," pp. 43-49) -- have not yet been either implemented or widely implemented for the variety of reasons discussed in the Report, and where implemented, have not been successful in adequately addressing the existing overcrowding problem for the public school student population.

11. According to the Comptroller's Report, building or expanding schools is both too slow and too expensive (Exhibit "7" to the Initial Weiss Decl., p. 36), bussing students to distant schools meets with strong resistance from public school parents who do not want their

children to spend additional travel time and do not want them attending school in a remote location (Exhibit "7," p. 32) and "double shifting" can adversely affect both the quantity and quality of education, by creating such problems as school days beginning and/or ending after dark, the disruption of after school activities and deterioration in the quality of the school environment (Exhibit "7," pp. 38-42). The proposed year-round school calendar has not been implemented in New York City, and prior to implementation, there would be many problems to overcome, such as the absence of air conditioning, parent and staff resistance and legal requirements. (Exhibit "7," pp. 48-50).

12. Further, the problems created by bussing public school students to distant schools for the entire school day, are even more problematic for Chapter 1 private school students, who are normally receiving Chapter 1 services for approximately one hour during their regular school day. It is simply not possible to bus private students to a distant public school site during the course of their regular school day; the loss of their regular class instructional time would be too great. In addition, double shifting is not even relevant to these private school students, since they are receiving Chapter 1 instruction for approximately an hour during a school day. Furthermore, their regular school day schedule is established by their private school, not by the Board of Education.

13. Finally, another solution to relieve overcrowding discussed by the Comptroller is the use of leased space for classroom use. (Exhibit "7" Initial Weiss Decl., pp. 27-30). This is a method the Board of Education already utilizes to provide Chapter 1 services to private school students.

The Cost of Mobile Instructional Units (hereafter "MIUs")

14. Plaintiffs' counsel states that the cost of the MIUs was found to be "extremely extravagant" by the Office of the Comptroller of the City of New York (Geller Declaration, paragraph 27) and attaches a letter as Exhibit BB," to his Declaration, dated April 26, 1988, from Roger D. Liwer, Director of Audits of the Office of the Comptroller to Steven Schwager, Chief School Business Executive of the Board of Education. This letter does not state that the cost of the MIUs was "extremely extravagant," although the letter does state that the Board should have obtained MIUs at less cost. In addition, this letter is not a final report of the Comptroller's Office, but as stated on page 1 of the letter, simply documents some "preliminary findings."

15. Plaintiffs' counsel has not attached Mr. Schwager's response to Mr. Liwer, by letter dated April 28, 1988, which is annexed hereto as Exhibit "I." Mr. Schwager pointed out many errors and incorrect assumptions in Mr. Liwer's letter. For example, Mr. Schwager noted that the conclusion that the cost of the Board of Education's MIUs was higher than necessary, was based in large part on a "cost" comparison of the Board's mobile instructional units with mobile instructional units used in other jurisdictions, and that the comparison was defective. Mr. Schwager pointed out that the costs of most MIUs from other jurisdictions cited by Mr. Liwer covered only the cost of the vehicle. Mr. Liwer then compared that cost to the Board of Education's cost. However, the Board of Education's cost figure includes not only the cost of the vehicle, but the cost of the unionized driver (whose salary and fringes exceed \$30,000 per year), as well as the costs of maintenance, repairs, cleaning, garaging, fuel and insurance.

16. In addition, the Board of Education's MIUs were not a standard model, but were custom designed. Although this made each unit more expensive, as Mr. Liwer noted, it allowed the Board of Education to design each MIU to simultaneously house two Chapter 1 functions; the custom design contains both an instructional area for a staff person and up to ten students, and a second small group area in which a staff person (such as a guidance counselor or school psychologist) can meet with a student and/or parent, an English as a Second Language teacher can provide small group instruction for up to four students, and consultation between staff or between a parent and staff can be held. Had the Board of Education used the same standard models as other jurisdictions cited by the Office of the Comptroller, only one activity could have occurred in each MIU at any one time. The cost of each unit would have been somewhat less, but a significant number of additional units would have been required to fulfill the same functions and the overall expenditure for MIUs would have been greater. Finally, the custom design allowed the Board of Education to incorporate very stringent safety features in the design, as mandated by the New York City Fire and Building Departments.

17. Plaintiffs' counsel also states that the Board of Education could have obtained Stationary Instructional Units (hereafter "SIUs"), which are small structures built to accommodate Chapter 1 classes. (Geller Decl., paragraph 27). Although the Board has not used SIUs as a post-Aguilar delivery method, we did investigate the possibility of using them in our post-Aguilar program.

18. There were several concerns about the use of SIUs. The first was a legal concern. At the time this method was under consideration, in 1987 and 1988, there were serious legal concerns raised by the placing of SIUs on

property owned by religiously-affiliated private schools. The New York State Education Department initially stated, in July 1985, that this was prohibited by Aguilar (see Memorandum from Robert D. Stone, Counsel and Deputy Commissioner for Legal Affairs for the State Education Department, annexed as Exhibit "6" to the Initial Weiss Decl.), and the United States Department of Education stated in June 1986, that SIUs could be placed on the property of religiously-affiliated private schools only in limited circumstances. (See June 1986 Guidance on Aguilar v. Felton and Chapter 1 of the Education Consolidation and Improvement Act, Questions and Answers, question 29, annexed as Exhibit "9" to the Initial Weiss Decl.). The Board accordingly planned to use SIUs, if at all, only in a small pilot program, which could serve to test their legality.

19. With great difficulty, the Board was able to locate three sites after extensive canvassing of the private schools to find available land on either private school property or other nearby available land, such as an empty lot. Vacant land is an extremely scarce commodity in many New York City neighborhoods.

20. We then began investigating the cost of constructing the SIUs. Initially, we anticipated that the cost would be relatively inexpensive, and that we could simply obtain a slightly modified version of the trailers that are used on Construction sites. However, it seems that no endeavor of this nature is ever simple or inexpensive in New York City. For example, in addition to all the New York City health and safety code requirements, we learned that we would also have to comply with any design requirements imposed by the Municipal Art Commission, a body created by the New York City Charter, which is empowered to review designs for buildings and other structures erected on

land owned or leased by local government. We met with the Commission, which proposed significant design modifications to make the structure more visually appealing. (It should be emphasized that their concern was primarily for the exterior appearance and the visual impression given to anyone who would use the street, rather than for the interior of the structure, which would most affect the students.) The Commission suggested we put a peaked roof on the structure, criticized the visual rhythms created by the fenestration (i.e., the windows), etc.

21. We also determined that obtaining an electricity hook-up would be costly. When all these factors were considered, we estimated that the initial cost for constructing each SIU would be \$100,000. (See Exhibit "2" annexed hereto, letter to Robert Eshard from Steven Schwager, dated May 26, 1987). Further, the likelihood of vandalism in these high-crime areas was a problem that would have to be addressed through additional operating expenditures for security, insurance and maintenance and repair services. Accordingly, SIUs did not appear to be nearly as cost-effective as originally anticipated.

22. Plaintiffs' counsel also asserts (Geller Decl., paragraph 27) that we could have placed SIUs in "the corners of playgrounds" on public school property. This would have deprived the public schools of a portion of their schoolyards, which are normally used for recreation and physical education. The number of Chapter 1 students in many private schools would have required several SIUs to accommodate the program. This would have meant the loss of a substantial amount of the very limited open space available to the public school. Based upon information provided by the Board's Division of School Facilities, there is no record that any public school has ever been forced to

give up a portion of its schoolyard for the benefit of students from another public school or a private school. Further, it is almost certain that plaintiffs' counsel's proposal would have been bitterly opposed by the affected public schools.

23. In addition, plaintiffs' counsel's proposal would have necessitated the same loss of instructional time through travel that has previously been described in relation to public school and leased sites. One of the primary reasons for using SIUs would have been to eliminate travel and the resulting loss of instructional time.

Additional Factual Assertions

24. Plaintiffs' counsel further asserts (Geller Decl., paragraph 10) that the defendants acknowledge that students who attend Hasidic schools constitute the second largest group of private school students receiving Chapter 1 services in New York City. This statement is inaccurate and has not been acknowledged by defendants. The second largest group of private school students receiving Chapter 1 services in New York City are students attending Hebrew Day Schools. This is a term which is used by the Board of Education to denote all schools which are affiliated with any branch of the Jewish religion. Thus, a Hebrew Day School may be affiliated with a Hasidic Jewish organization, an Orthodox Jewish organization, a Conservative Jewish organization, etc. The Board of Education makes no official inquiry, in the course of administering the Chapter 1 program, as to the affiliations of the Hebrew Day Schools whose students participate in the Chapter 1 program. However, for the purpose of preparing this declaration, a member of my staff who has personal knowledge of the affiliations of the Hebrew Day Schools, reviewed the list of the 42 schools whose students participate in the Chapter 1

program, and informed me that 11 of these schools are affiliated with Hasidic Jewish groups and the remaining 31 Hebrew Day Schools are not affiliated with Hasidic Jewish groups.

25. Plaintiffs' counsel also states that there is a "standard time for a recess between classes" of approximately 10 minutes (10 minutes is the maximum one-way vehicular travel time used in the transport of private school students to Chapter 1 sites). (Geller Decl., paragraph 24). However, approximately 85% of the private schoolchildren served in the Board of Education's Chapter 1 program are in the elementary school grades (kindergarten through sixth grade). In elementary school grades, in both the public and private schools, there are no regular class changes nor recess between classes; students are in one class, and normally stay in the same room with the same teacher for the full school day. Accordingly, when private school students travel to a public school (or leased) site for Chapter 1 instruction during the course of the school day, the time spent traveling is normally time in which they would otherwise be receiving instruction in their regular school class, not "recess" time.

26. Finally, plaintiffs' counsel asserts that most of the public school sites selected under the original 1986 Board of Education plan were no more than one City block from the private school and cites to ¶ 22 of the June 3, 1986 affidavit of Joseph Saccente (annexed to the Geller Decl. as Exhibit "A") in support of that assertion. The Saccente affidavit does not state that most of the offered public school sites were less than a block from the private school, and my own recollection is that most of the offered public school sites were more distant. Indeed, documents provided to plaintiffs' counsel in discovery in the related case of

Committee for Public Education and Religious Liberty, et al.
v. Secretary, United States Department of Education, et al.,
88 Civ. 96 (JG), also pending before this Court, show that
of the public school sites utilized for Chapter 1 services,
only about 5% of the public school sites were less than a
block from the private school, another 5% were one block
from the private school, and 90% were further, with most
being 1/4 to 3/4 of a mile away from the private school.

Conclusion

27. For foregoing reasons, it is respectfully
requested that the defendant Chancellor's motion for relief
from the judgment be granted.

Dated: Brooklyn, New York
January 19, 1996

[Margaret O. Weiss]
MARGARET O. WEISS

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 Livingston Street
Brooklyn, NY 11201

Steven Schwager
Chief School Business Executive

April 28, 1988

Mr. Roger D. Liwer, Director of Audits
Office of the Comptroller
161 Williams Street
New York, New York 10038

Dear Mr. Liwer:

We are deeply disturbed by your recent letter on the Contracting of Mobile Instruction Units (MIUs). Your staff, in the form of three different audit teams, has spent almost 18 months examining this contract. Yet, in spite of hundreds of hours of meetings with the Board and Contractor officials, detailed and time-consuming testing and analysis of the vehicle, the report is replete with errors and inconsistencies. For example, your letter indicates that the costs to lease MIUs in seven other jurisdictions is between \$10,000 and \$20,000. These comparisons are irrelevant and ridiculously low when one considers that the cost of a unionized driver with fringe benefits in New York City is in excess of \$30,000. Further, five of the seven lease prices

cited in your letter for comparison purposes are incorrect when compared with the school districts actual leases. In addition, the individual school district leases generally cover the vehicle only. The school district absorbs the other costs as part of its operating budget. Your staff failed to indicate this in the document provided.

Our discussion with officials in six of the seven jurisdictions disclosed that: in several of the cities, vehicles are frequently left unattended due to driver delay in picking up or dropping off the vehicle when a teacher is not present; reports of vandalism and of an incident wherein a teacher's pocketbook was stolen while teaching class have been made; and the generators were made for general use in recreational vehicles only and tend to break down with extended use in MIU's, resulting in a serious loss of class instruction time.

The report also fails to place the issue in context and neglects to account for the unique instructional setting we required for the program. Each of the MIUs was designed to house two groups of students simultaneously; one group of ten receiving remedial instruction in Reading, Math and English As a Second Language, the other, a smaller group receiving guidance services. None of the other jurisdictions cited in your study have such dual purpose vehicles. If we had failed to do this, we would have needed 140 vehicles rather than the 70 we contracted for.

Finally, both the RFB format and contents has been debated in various forums including the courts and the Commissioner of Education. Each has found that the specifications were clear and provided procedures for bidders to have their questions answered and to submit alternatives. Despite these independent rulings. Your office, without adequate explanation, still claims the specifications were

unclear.

Your comments about not renewing the contract for the next school year are not based on the actual terms of the contract. Our Office of Legal Services is convinced that the initial term of this contract is four years and ten months or until June 30, 1991. After that the contract can be extended or terminated on a year-by-year basis until June 30, 1996. Consequently, your recommendation cannot be accepted.

Even if we could follow your suggestion (which our lawyers believe is illegal), the short time available between now and the opening of school would make it impossible to achieve delivery of a new fleet of vehicles. I would also like to point out that your comments on alternative suppliers are misleading. Each of the vendors you claim as capable of delivering MIU's can only produce vehicles half of our required size and do not want to enter into fully loaded leases. They indicated that they can supply vehicles but do not want to provide drivers, maintenance, insurance, etc.

I have attached our detailed comments to each of the matters raised in the report. After you have had an opportunity to review them, I would like another meeting if you still intend to issue a draft report.

Very truly yours,

[Steven Schwager]

Steven Schwager

Chief School Business Executive

SS:sb

History and Present Context

The Board of Education had been providing Chapter 1 services to over 250 non-public schools for over 20 years. The method of service delivery was to send our teachers into a designated classroom in the non-public school. In 1985, the U.S. Supreme Court issued a decision in the Aguilar vs. Felton case which stated that public employees were no longer permitted to enter the non-public schools in order to provide instruction. at the request of the Board of Education and the non-public schools, the courts delayed implementation of the ruling until September 1986.

The Board of Education, in consultation with the Corporation Counsel and the Committee of Non-Public School Officials, began meeting on a regular basis to develop an implementation plan.

Many alternatives were considered, including:

- leasing neutral sites
- leasing vacant apartments
- purchasing a portion of the non-public school
- mobile classrooms
- stationary classrooms
- use of available public school space
- after school hours and weekend programs

Of these, based on the advice of Corporation Counsel, the

Board elected to adopt the following programs for school year 1986-87.

1. Non-public school children would be serviced in available public school sites.
2. If the nearest public school was more than 10 minutes away, or had no room, an MIU would be assigned.

As your study specifically examines the MIUs, I will address the circumstances surrounding their acquisition.

- From October 1985 to January 1986, staff at the Board of Education contacted other jurisdictions using MIU's to determine their proposed implementation of the Aguilar vs. Felton decision. Where they indicated that they employed or planned to employ an MIU-type vehicle, we inquired as to their particular design and operational problems. In addition, numerous meetings were held with the Buildings and Fire Departments to ensure that their concerns would be addressed in our planning stages. In January 1986, based on our educational needs, three designs were prepared and submitted to the Committee on Non-Public Schools for review and comment. Simultaneously, a draft request for bid was sent to over 600 potential vendors throughout the country, asking for their review and comments.
- A pre-bid conference was held on February 18, 1986 and eighteen (18) prospective

vendors attended. Based on the comments received, changes were made in the bid document which included the specification of only one design.

- On March 26th, the proposed bid was advertised in the City Record.
- On March 27th, the Request For Bid was mailed out to prospective bidders.
- On April 2nd, two amendments were issued and sent certified mail to the prospective bidders.
- On April 14th, the bids were opened and seven bids were received.
- Within the next several weeks, the contracts were awarded.
- Four months later, the winning vendor had built 70 units designed to meet our unique educational needs and delivered them in time for the opening of school in September 1986.

The larger area in the MIU is used by the instructional staff to provide remedial reading, mathematics and English As A Second Language services to groups of B-10 students. In the smaller area, clinical and guidance support services (i.e., guidance counselors, social workers, psychologists) are provided to students enrolled in the instructional programs. Students are seen individually or in groups of two-three students.

Currently, the smaller instructions area is being utilized 61 % of the time for clinical and guidance services and for the provision of English As A Second Language classes to kindergarten and first grade children. When this area is not being used by the clinical/ guidance or English As a Second Language staff, it is utilized in the following manner:

- During preparation periods, staff completes mandated reports such as testing results, attendance data and progress reports which are distributed to parents of participating students.
- Staff conducts inter-component meetings in order to discuss and evaluate the progress of students enrolled in more than one Chapter 1 program.
- Central supervisory staff conducts on-site conferences with Chapter 1 staff.
- Staff conducts conferences with parents and nonpublic school personnel.

It is important to note that clinical and guidance services are considered important elements of the Chapter 1 program provided to eligible students attending nonpublic schools. Therefore, nonpublic school administrators have exercised the option of spending a portion of their allocation on these support services. In order to provide these services, it was necessary to purchase oversized vehicles. Therefore, any vehicle purchased must have met our needs and not simply been acquired because it seemed an inexpensive or expedient alternative. To date, these 70 vehicles have provided over two million student days of instruction without a breakdown

or major operational problem whereas several of the other jurisdictions cited in your report indicated serious operational problems with their MIUs.

RFP vs. RFB

Your letter contains a number of comments concerning the appropriateness of utilizing the RFP as opposed [sic] to an RFB approach. Standard government purchasing practices generally defines these two approaches as follows:

Request for Proposal (RFP)

The RFP format is utilized only in those instances where the acquisition of professional and consulting services are required which cannot appropriately be made principally on the basis of price, or where the nature of the professional and consulting service does not lend itself to the preparation of a complete, adequate and realistic specification or purchase description.

mandates the use of the RFP process for professional and consulting services for the sole purpose of securing the service at an equitable price.

Section 103 of the General Municipal Law exempts contracts involving professional services from competitive bidding (RFB's). As a result, the Board of Education, in its SOPM

Request for Bid (RFB)

The RFB format is employed for the acquisition of items which are capable of being completely described through the use of a comprehensive, highly technically defined, specific description in which the selection of the successful bidder can be made principally on the basis of price.

Section 103 of the General Municipal Law mandates that purchase contracts for tangible goods in excess of \$15,000 be let only as the result of formal competitive bidding procedures.

The acquisition was correctly conducted in the RFB mode as MIU's are manufactured items, capable of being specified through a finite, highly detailed description, thereby allowing award of contract to be based on price in the presence of specification compliance. The bidding process adhered strictly to the RFB format in which the ability to accept equivalent products not only occurs regularly, but is legally required to be stated as well as evaluated, if offered by an apparent low bidder.

In June, 1987, the Commissioner of the State Education

Department reviewed this award of contract pursuant to an appeal petition by M.A.J. School Bus, Inc. This decision referred to the case history surrounding equivalencies:

...it has long been the law that school districts are required to permit bid proposals to allow for the use of equivalencies. (Matter of A-E Architectural Materials, Inc., 17 Ed Dept. Rep. 146, judgement granted dsmsg. pet. to review, sub nom Buck Construction Corp. V. Arback et al., Sup. Ct., Albany County, Sp. TM., CONWAY, J., Jan. 13, 1978, n.o.r.; Fonseca v. Board of Education of Rome City School District, 58 Misc. 2d 223; Matter of Hotaling, 75 State Dept. Reports 97). A bid proposal which did not allow or provide for the ability to use equivalent equipment or materials has been held to be improper on the ground that it would preclude the type of competition envisioned by the provisions of Article 5-A of the General Municipal Law relating to public contracts (Fonseca, supra).

The submission of a sample or prototype was unsuccessfully imposed in this case to ensure that the product offered was in substantial compliance with the specification. This is an acceptable and prudent bidding practice.

The petitioner's appeal also contained an allegation that the Board's old specifications "... were either ambiguous or so indefinite that they did not constitute reasonably definite specifications for competitive bids." However, after review, the Commissioner found that:

... based upon the record before me, ...the bid specifications clearly conveyed the intent of respondent board as to the structure, design and

requirements of the Mobile Instructional Unit to be furnished. Any variation in a proposal submitted by a bidder had to be the equivalent of the specifications and shop drawings set forth in the bid proposal and specifications. Contrary to petitioner's argument, the bid specifications were not so ambiguous or amorphous as to deprive a prospective bidder of the knowledge as to what he was expected to submit in seeking an award of the contract.

Further, the Commissioner noted that "...the bid proposal and specifications provided a means for the resolution of any ambiguity." The "...petitioner failed to make any inquiry even though it now contends that the bid specifications were so ambiguous that it could not discern what type of substitution or equivalencies would be permissible. In view of the availability of a means of resolving any questions it may have had about the specifications, I find no merit to petitioner's argument."

The appeal was denied.

Your report raises the rejection of Bernard Montgomery Co. as an issue. The bid documents required the submission of shop drawings and identification of the manufacturer. We rejected Bernard Montgomery's bid based on their letter of April 11, 1986, which indicated that they did not have a manufacturer available to produce the shop drawings on the vehicle. In addition, they were unable to identify a manufacturer capable of constructing and delivering a vehicle in a timely manner. The Comptroller concludes that we could have saved \$1.25 million over 5 years if Bernard Montgomery had been awarded the contract. Unfortunately, there was no way to determine that Bernard Montgomery could have delivered the vehicle, especially since they could

not name a manufacturer. Absent such assurance, and given the time constraints, the prudent course was to deal with a more responsible vendor in order to insure that our programs would begin as scheduled and that no child would be deprived of remedial instruction.

When reviewed in its proper context, it is obvious that the RFB mechanism utilized to contract for the MIUs enabled the Board to have maximum latitude in determining required quantities, obtain the optimum design for instructional needs, and minimize the time expended in the procurement process. The relief remedies provided, to dissatisfied potential bidders within the bid document as well as the various legal options available after the fact, support the Board's decision not to RFP.

I will now address the substantive disputes between the actual facts and your interpretation of the Board's actions.

Contradiction of Design

First, your observation that there appeared to be inherent contradictions in the design of the MIU are incorrect. A custom design was required to meet the particular needs of the Chapter 1 program for New York City within the context of the regulations and requirements of the agencies having jurisdiction.

As I have already discussed, a separate guidance area was required in the vehicle. A generator was specified to provide electrical power to the MIU to preclude any physical connection or modification to the served school in accordance with Federal guidelines.

Stationary units were never considered and there was no

confusion about this issue. Federal regulations permitted Chapter 1 services to be provided only on neutral sites or in MIUs. The only option was whether units would be parked in the street or on the school property. The Department of Buildings stated that if the MIUs were to be parked off-street, on school property, they would be subject to the Jurisdiction of that agency and should be made to comply with the Building Code (see Appendix I, Dennis/Chiljean/letter dated Dec. 18, 1985). This inclusion of building Code requirements in the specifications were therefore warranted and necessary.

Our consideration of the RV-type van (precisely what you are recommending as a more cost-effective alternative) was halted when, in our preliminary investigations of available vehicle-classrooms, we received a November 1985 memorandum from the New York City Fire Department (see Appendix II) which stated:

.... that although the fire incidence rate for mobile homes is approximately the same as for conventional dwelling, the injury, life hazard and property loss is three to five times greater. While most fires in conventional dwellings are initially localized and small in size, the design characteristics inherent in mobile homes, such as fire load density, room geometry and combustible finishes provide the potential for rapid flame development, with resulting higher temperatures and smoke and toxic gas generation, in a relatively short period of time. The addition of approximately sixty (60) gallons of fuel carried in this vehicle will only exacerbate conditions.

The Fire Department also provided the Board of Education

with requirements for MIUs, including a sprinkler system, which were included in the specifications (see Appendix III Rice/Bruno/memo dated Dec. 16, 1985). The vendor was to prevent freezing in the sprinkler system. The sprinkler requirement was deleted after further safety systems proposed by New York Bus and Daily Bus were deemed acceptable. Three exit doors were provided in the design to ensure adequate egress as per the Fire Department requirements. Further, New York State Education and Vehicle regulations were included due to the unique nature of a MIU.

Simply stated, ready-made vehicles did not meet our needs or requirements as highlighted above.

Safety Problems

In response to the specific safety issues in the audit, please note the following:

1. Insulation

Foam-in-place urethane was specified because of its high efficiency as thermal insulation. Within the limited thickness required by the shell of the MIU.

Prior to the use of the MIUs, a sample of the actual insulation was examined as tested by National Testing Laboratories to ascertain any potential hazard. The sample was identified as polyurethane foam and was found to char but not ignite or support combustion which would preclude the release of toxic gases (report attached).

Nyack, Syracuse, Rochester and Buffalo (your

specific examples) all use vehicles which have foam insulation.

Specifications for vehicles with similar instructional uses in other jurisdictions i.e., MediCoach Co. and Oklahoma City schools' Title I vehicles, also indicate foam-in-place urethane insulation.

2. Wheelhousing

To date, over 12,000 Chapter 1 students have received services in mobile Instructional Units and there have been no reported accidents involving injury to students.

3. Extension Steps

Extension steps are locked in place by the driver prior to the MIU being utilized for Chapter 1 services. They remain in that position during the instructional day and are released prior to the MIU's departure. There have been no reported incidents where the extension steps have not been in place.

Each MIU has stepwell covers to enclose the open steps so that students do not fall into the steps while walking around the interior of the vehicles. These stepwell covers have to be raised by the driver/security guard for the purpose of exiting or entering the vehicle. They can either be secured in an 'up' position or removed entirely. This will have no impediment to egress and would be similar to a regular bus with stepwells at the exit doors.

4. Handrails

Current policy dictates that the MIU driver assist the students when entering and exiting the MIU. The company will, however, be instructed to install the handrails.

Cost Comparison

Our own review of the six cities surveyed by your auditors revealed wide disparities between services received by the New York City Board of Education and those received by the other cities as shown in the following chart:

<u>School</u> <u>District</u>	<u>No. of</u> <u>MIU's</u>	<u>Lease Price Includes</u>				
		<u>Driver's</u> <u>Salary</u>	<u>Insur</u> <u>ance</u>	<u>Maint</u> <u>enance</u>	<u>Gas</u>	<u>Stor-</u> <u>age</u>
Buffalo	5	No	No	No	No	No
East Ramapo	5	Yes (1)	No	No	No	No
Syracuse	6	No	No	No	No	No
Yonkers	5	Yes (1)	No	No	No	Yes
Nyack	1	No	No	No	No	No
Rochester	2	No	No	No	No	No
NYC BOE	70	Yes (2)	Yes	Yes	Yes	Yes

Notes:

- (1) Non-Union Drivers
- (2) Union Drivers

Our discussion with officials in six of the seven

jurisdictions disclosed that: in several of the cities, vehicles are frequently left unattended due to driver delay in picking up or dropping off the vehicle when a teacher is not present; reports of vandalism and of an incident wherein a teacher's pocketbook was stolen while teaching class have been made; and the generators were made for general use in recreational vehicles only and tend to break down with extended use. This results in substantial lost instruction time. Unlike New York City, no City surveyed required spare vehicles.

Further, based on our review of the actual leases for the vehicles, the prices cited for most of your examples are incorrect. Finally, as discussed earlier, the other vendors provide vehicles half the size we require which would force us to double the number of vehicles in use.

CONCLUSION

Virtually all of the matters raised in this report had previously been considered, reviewed, and/or challenged by Board officials, Corporation Counsel, the Committee on Non-Public Schools, the Courts, the Commissioner of Education, and other investigatory groups. Subsequently, each of these groups found that the Board acted properly in the letting of this contract. After you consider our comments and reflect on them, I am sure you will come to a similar conclusion.

[LETTERHEAD]

APPENDIX I

December 18, 1985

CORNELIUS F. DENNIS

Deputy Commissioner

Phone Number

Mr. Roger A. Chiljean
Acting Director
Office of Design & Construction
New York City Board of Education
28-11 Queens Plaza North
Long Island City, New York 11101

Re: Mobile Vans

Dear Mr. Chiljean:

Your letter of October 23rd and accompanying typical specifications for a mobile trainer and two motor vans to be used for teaching purposes has been reviewed by my staff with your liaison office. A copy of a letter from the Fire Department dated November 29th has also been reviewed.

Trailers or motor vans parked and used on the city street are not under the jurisdiction of the Department of Buildings. Trailers and vans used for school purposes on school property are subject to the jurisdiction of this department and should be made to comply with Tables 3-4 and 4-1 of the Building Code. These tables relate to construction classifications with particular reference to fire ratings. In discussion with your liaison office, I have been advised that the smaller motorized unit would most probably be used since the need is for a unit to service up to twelve people for three to four hours on one site. This unit is metal frame

however the inner finish is wood with styrofoam insulation. An attempt should be made to secure a unit with non-combustible insulation in lieu of styrofoam. The finished material, wood or plastic, should be selected with care, as to their flamability [sic] characteristics.

I believe that with suitable care and some degree of fire alarm-smoke detector installation along with appropriate siting of the vehicle on the school yard this department would be able to approve the use of either a mobile trailer or a motor van for use as a portable classroom for up to twelve students.

Very truly yours,

[Cornelius F. Dennis]

Cornelius F. Dennis, P.E.
Deputy Commissioner

APPENDIX II

[FIRE DEPARTMENT LETTERHEAD]

November 29, 1985

Roger A. Chiljean
Acting Director
Office of Design and Construction
New York City Board of Education
28-11 Queens Plaza North
Long Island City, New York 11101

Dear Mr. Chiljean:

Your letter to Commissioner Joseph Spinnato, in which you propose utilization of mobile vans for teaching purposes, has been referred to me for response.

While this Department, at this time, has not regulations governing this specific type occupancy or use, we do insist that all current life safety, fire protection and construction requirements relating to schools be adhered to.

Our apprehension concerning your proposal is based on the fact that although the fire incidence rate for mobile homes is approximately the same as for conventional dwelling, the injury, life hazard and property loss is three to five times greater. While most fires in conventional dwellings are initially localized and small in size, the design characteristics inherent in mobile homes, such as fire load density, room geometry and combustible finishes provide the potential for rapid flame development, with resulting higher temperatures and smoke and toxic gas generation, in a relative short period of time. The addition of approximately sixty (60)

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galls of fuel carried in this vehicle will only exacerbate conditions.

Thank you for your interest in fire safety.

Very truly yours,

Anthony W. DeVita, D.A.C.
Exec. Asst. to Chief of Dept.

AWD:RMM

APPENDIX III[FIRE DEPARTMENT LETTERHEAD]

December 16, 1985

TO: Joseph F. Bruzo 1st Deputy
Fire Commissioner

FROM: William D. Rice Lieutenant. Public
Buildings Unit

SUBJECT: Minutes of Meeting Conducted on December
12, 1985 to discuss Board of Education's
proposed Utilization of Mobile Homes for
educational use. This meeting was convened
by the New York City Corporation Council.

MEETING

- 1] Place: Fire Department Headquarters, 8th Floor,
Chief of Department's Conference Room
- 2] Attendees: Attendance sheet attached.
- 3] Purpose: Board of Education proposed to use
self propelled mobile homes as
Classroom to provide remedial
education fat those children currently
enrolled in the private/ parochial
educational system as required by law.
This meeting was called to discuss this
Department's objections to this
proposal and solicit from the Fire
Department what Life Safety and Fire

Protection system would be required to allow these vehicles to be utilized in the fashion so desired by the board of Education.

4) Fire Department Recommendations:

This Department recommended these vehicles comply with the following prior to any consideration of their intended use:

- a) New York City Department of Buildings approval to be obtained for such use. This approval is to contain maximum occupancy load for classroom use as is required by code.
- b) Sprinkler system be installed with adequate water supply and approved by this Department.
- c) At least 2 exits, remote from each other be provided. In addition, each exit door is to be equipped with panic type hardware and open in the direction of egress.
- d) Smoke detectors are to be provided throughout, especially in cockloft area.
- e) Flaw spread, smoke spread and toxicity ratings of all interior finishes, furnishings and floor coverings are to be in compliance with New York City Buildings Code for "C" (school) type occupancies.
- f) As required by code, interior fire alarm is to

be installed and be capable of transmitting an alarm to parent school which in turn shall notify the Fire Department. There shall be no pre-signal device, in so far as fire alarms are concerned, installed.

- g) There shall be a communication system installed capable of direct/dedicated communication between vehicle and parent school.
- h) Site selected for vehicle placement, outside of parent school be accessible to Fire Department apparatus and approved by this Department.
- i) Exterior of vehicle be distinctively marked so as to make it easily identified.
- j) Vehicle exhaust system be designed so to prohibit toxic fumes from entering into same.
- k) Fire drill and evacuation plans be prepared for each vehicle and submitted to this Department for approval.

Conclusion:

It is the opinion of all Fire Department members present at this meeting that unless all Fire Department recommendations are incorporated in any proposal to utilize these vehicles for educational purposes this Department strongly object to this type usage.

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Respectfully submitted,

[William D. Rice]

William D. Rice

Lieutenant, Public Buildings Unit

WDR:mm

cc: Chief Jos. M. DeMeo
Chief Wm. Manny, Jr.

APPENDIX IV

[NATIONAL TESTING LABORATORIES, INC.
LETTERHEAD]

BOARD OF EDUCATION
28-11 BRIDGE PLAZA NORTH
LONG ISLAND CITY, N.Y. 11101

EXAMINATION OF FOAM INSULATION

SAMPLE MARKINGS: MOBILE INSTRUCTIONAL
UNIT, NY BUS SERVICE

THE ABOVE SAMPLE OF FOAM INSULATION WAS
SUBMITTED FOR IDENTIFICATION AND
COMBUSTIBILITY.

OUR EXAMINATION REVEALED THAT THE
MATERIAL WAS POLYURETHANE FOAM.

A FLAMMABILITY TEST INDICATED THAT THIS
MATERIAL WILL CHAR BUT WILL NOT IGNITE OR
SUPPORT COMBUSTION.

THE LACK OF COMBUSTION WILL PRECLUDE THE
RELEASE OF ANY TOXIC GASES.

NATIONAL TESTING LABORATORIES, INC.

F. KONSTANDT
TECHNICAL DIRECTOR

30 AUG. 1986
REF. 20699

[BOARD OF EDUCATION LETTERHEAD]
MEMORANDUM

APRIL 29, 1988

TO: MEMBERS OF THE BOARD OF
EDUCATION

FROM: RICHARD A. GREEN

RE: Comptroller's Letter Dated April 26, 1988
Concerning the Contract for Mobile
Instructional Units

Attached please find a letter dated April 26, 1988 from the Office of the City Comptroller concerning the Board of Education's contract for mobile instructional units.

In addition, I have attached our response dated April 28, 1988 which refutes each of the comments made.

I have also summarized both letters for ease of review.

I request this item be placed on the agenda for the May 3, 1988 meeting.

RRG:mc

cc: J. Nolan
M. Tucker
J. Shenker
S. Ladner
B. Williams
J. Posman
S. Schwager
K. Standard
R. Terte

Analysis of Comptroller's Letter

<u>Comptroller States</u>	<u>B. of E. Response</u>
1. Contract should not be renewed for 88-89 school year.	1. Initial contract term is 4 years and 10 months. No renewal provision until 1991.
2. At the outset Board did not decide whether it needed a stationary trailer unit or mobile unit.	2. Board determined at the initial stages it wanted a mobile unit. The Board also determined that it wanted a vehicle with two (2) components in order to meet our unique educational standards. The issue was where to park it - on the street or non-public school property.
3. Board did not acquire standard vehicle. It specified a custom vehicle.	3. Fire Department and Building Department safety requirements precluded a "standard" vehicle. See Appendix II of our response concerning mobile homes.

- | | |
|---|--|
| <p>4. Board should not have provided an or-equal clause in the bid documents, should have used a request for proposal instead of a bid, should not have made this procurement on a requirement contract basis and should not have required a prototype.</p> | <p>4. The State Commissioner of Education in an action against the Board by a losing MIU bidder has ruled that our method of procurement was proper and that an or-equal clause was legally required.</p> |
| <p>5. Board rejected a bid from Bernard Montgomery because they failed to submit required shop drawings.</p> | <p>5. This matter was discussed with the Board at the meeting when contract was ratified. Bernard Montgomery failed to submit shop drawings because it did not have a manufacturer to produce the vehicle.</p> |
| <p>6. NY Bus vehicle is unsafe:</p> <p>a) Polyurethane foam used in vehicle emits a toxic gas when it burns.</p> | <p>6.</p> <p>a) Laboratory tests performed by our lab (See appendix IV of our response)</p> |

indicate this is not true. Further "standard" MIU's proposed by Comptroller have styrofoam insulation which the building department specifically stated [sic] should not be used (See Appendix I).

b) Protruding wheel housing in the aisle is a safety hazard.

b) Over 12,000 children have used our MIU's for over 200 days without a single reported accident.

c) Exterior steps lack a handrail and a step well cover must be manually removed.

c) Contract will be directed to install handrail; step well cover will be modified or removed.

- | | |
|--|---|
| <p>7. Cost of "standard" MIU's used in other jurisdictions are much cheaper than our custom MIU's.</p> | <p>7. Comptroller is comparing apples and oranges. MIU's in other jurisdictions are standard vehicles which do not meet N.Y.C. building and fire codes. Leases are for the vehicle only. No mention is made of other costs, such as gasoline, insurance, maintenance, garage, storage, and the driver in Comptroller's figures.</p> |
| <p>8. Comptroller states other supplies can deliver new MIU's for September.</p> | <p>8. Our contacts with cited vendors indicate that they can supply "standard" vehicles for September. The vehicles are generally half the size required. The vendors <u>do not</u> want to provide drivers, insurance, maintenance, etc.</p> |

[BOARD OF EDUCATION LETTERHEAD]

Steven Schwager
Chief School Business Executive

March 26, 1987

The Honorable Robert Eshard
Deputy Mayor
Office of The Mayor
City Hall
New York, New York 10007

Dear Mr. Eshard:

As part of its plan to comply with Federal Law while providing Chapter 1 services to non-public school pupils, the Board of Education will soon bid contracts to place Stationary Instruction Units (S.I.U.'s) on parochial school property, a portion of which is to be leased by the Board.

Sub-Section 854(d) of the New York City Charter states that "Municipal Art Commissions approval is not required for any building or other structure which has a total estimated cost of less than 4250,000.00, if the Mayor or the City Counsel requests, in writing, that the Commission not act".

I ask that the Mayor make such a request, on behalf of the Board, based on the estimated cost and nature of these units, as detailed below:

1. A Stationary Instruction Unit is a modified

trailer module with metal skin, 12'-0" x 60'-0". It contains two small classrooms, for ten pupils each, and two small counseling areas; pupils will occupy it for 45-minute periods.

2. It will be supported by jacks resting directly on pavement or on concrete footings, if required.
3. Each S.I.U. will cost approximately \$100,000. Site development is restricted (by Law) the minimum necessary to place a S.I.U., demark the leased area, obtain electric power and permit safe operation of the unit.

It has not yet been determined whether the S.I.U.'s will be leased or purchased by the Board of Education.

If you need any additional information about the S.I.U. Program, please let me know.

Thank you for your consideration.

Sincerely,

[Steven Schwager]

Steven Schwager

Chief School Business Executive

SS:tg

cc: J. Saccente
M. Sinansky
Min Schwartz

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL
A. SCHWARTZ, ROBERT H.
SIDE and ALLEN H. ZELON,

STIPULATION AND
ORDER ALLOWING
INTERVENTION AND
ADDING A
DEFENDANT

Plaintiffs,

78 CV-1750 (JG)

- against -

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION
and CHANCELLOR OF THE
BOARD OF EDUCATION OF THE
CITY OF NEW YORK,

Defendants.

and

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINES, and BELINDA WILLIAMS,

Defendant-Intervenors.

WHEREAS, parents of children who attend private
schools in New York City and who receive benefits under

the provisions of Chapters 1 and 2 of the Education Consolidation and Improvement Act of 1981, as amended, which has been challenged in this action, desire to intervene as defendants in this case to protect the interests of their children; and

WHEREAS, in 1978, Yolanda Aguilar, Lillian Colon, Miriam Martines and Belinda Williams, parents of children who attended Roman Catholic elementary schools in Brooklyn and the Bronx, were defendant-intervenors in the above-captioned case; and

WHEREAS, the aforesaid defendant-intervenors no longer have a cognizable interest in this litigation; and

WHEREAS, the following persons are parents of children who attend Roman Catholic elementary schools in the City of New York and who now desire to intervene as defendants to protect the interests of their children in receiving Chapter 1 and Chapter 2 benefits hereafter:

a. Rachel Agostini, who lives in Brooklyn, New York, is the parent of Kenneth, a first-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

b. Maria Cosarca, who lives in Brooklyn, New York, is the parent of Diana and Veronica, first- and fourth-grade students at St. Nicholas Elementary School who benefit from the Chapter 1 and 2 programs;

c. Digna Duran, who lives in Brooklyn, New York, is the parent of Henry Gomez, a second-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

d. Ivette Encarnacion, who lives in Brooklyn, New York, is the parent of Shana, a second-grade student at St. Nicholas Elementary School who benefits from the

Chapter 1 and 2 programs;

e. Maria L. Fernandez, who lives in Ridgewood, New York, is the parent of Myrelis E. Guzman, a third-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

f. Dolly Cutrera Then and Joseph M. Then, who live in Brooklyn, New York, are the parents of Stephanie, a first-grade student at St. Nicholas Elementary School who benefits from the Chapter 1 and 2 programs;

g. Margaret Figueroa, who lives in Brooklyn, New York, is the parent of La Risa, a fifth-grade student at St. Francis Xavier School who benefits from the Chapter 1 and 2 programs;

h. Michele Gallo, who lives in Brooklyn, New York, is the parent of Lauren Ann, a fourth-grade student at St. Francis Xavier School who benefits from the Chapter 1 and 2 programs;

i. Marie Sejour, who lives in Brooklyn, New York, is the parent of Shantique and Shande, second- and third-grade students at St. Francis Xavier School who benefit from the Chapter 1 and 2 programs;

j. Joan Jackson, who lives in Brooklyn, New York, is the parent of Tyrone, a fifth-grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs;

k. Cheryl Malcousu, who lives in Brooklyn, New York, is the parent of Alicia, a fourth-grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs;

l. Tonya Stevens, who lives in Brooklyn, New York, is the parent of Saiquan, an eighth-grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs; and

m. Rosemarie Vasquez, who lives in Brooklyn, New York, is the parent of Nicholas Zarzuela, a second-

grade student at St. John the Baptist School who benefits from the Chapter 1 and 2 programs; and

WHEREAS, the fourteen parents mentioned in the preceding paragraphs a. through m. are represented by the law firm of Williams & Connolly, 725 12th Street, N.W., Washington, D.C. 20005 (by Kevin T. Baine);

WHEREAS, the fourteen parents mentioned in the preceding paragraphs a. through m. have a strong interest in this litigation that is not necessarily shared by the other parties to this action;

AND WHEREAS, the Chancellor of the Board of Education of the City of New York is a defendant in this action and the Board of Education of the City School District of the City of New York ("the Board of Education") is the educational policy-setting body and is the Local Educational Agency for the Chapter 1 program in New York City;

WHEREAS, the Board of Education should be a party-defendant under Rule 20(a) of the Federal Rules of Civil Procedure, as an entity against whom there is asserted a right to relief arising out of an occurrence common to all defendants and because there are raised questions of law and fact common to all defendants in this action;

WHEREAS, the Board of Education is represented by the Corporation Counsel of the City of New York, Paul Crotty, 100 Church Street, New York, NY 10007, which is also counsel to the Chancellor of the Board of Education of the City of New York;

IT IS HEREBY STIPULATED AND AGREED by the undersigned counsel for the parties to this action that:

1. The fourteen parents named in paragraphs a. through m. above shall be permitted to intervene as defendants in this case pursuant to the provisions of Rule 24 of the Federal Rules of Civil Procedure.

2. Yolanda Aguilar, Lillian Colon, Miriam Martines, and Belinda Williams shall be permitted to withdraw as defendant-intervenors.

3. The Board of Education of the City School District of the City of New York shall be added as a party defendant pursuant to the provisions of Rule 20(a) of the Federal Rules of Civil Procedure.

4. The caption of this case shall be amended as in the attachment to this Stipulation as Exhibit A.

Dated: December 19, 1995

Respectfully submitted,

[Stanley Geller ktb]
STANLEY GELLER (SG 2876)
750 Lexington Avenue
New York, NY 10022
(212) 486-4590

ATTORNEY FOR PLAINTIFFS

PAUL A. CROTTY
Corporation Counsel

By [Marilyn Richter ktb]
MARILYN RICHTER (MR 8476)
Assistant Corporation Counsel
100 Church Street, Room 6-C-34
New York, NY 10007
(212) 788-0931

ATTORNEYS FOR CHANCELLOR
AND BOARD OF EDUCATION OF
THE CITY OF NEW YORK

[W. Scott Simpson ktb]
W. SCOTT SIMPSON (WS 4406)
Federal Programs Branch
Civil Division - Room 986
U.S. Department of Justice
Post Office Box 883
Washington, DC 20044
(202) 514-3495

ATTORNEY FOR THE UNITED
STATES SECRETARY OF
EDUCATION

[Kevin T. Baine]
KEVIN T. BAINE (KB 0710)
Williams & Connolly
725 12th Street, N.W.
Washington, DC 20005
(202)434-5000

[Richard E. Donovan ktb]
RICHARD E. DONOVAN (RD 4388)
Kelley Drye & Warren
101 Park Avenue

New York, NY 10178
(212) 808-7800

ATTORNEYS FOR DEFENDANT-
INTERVENORS JUAN COLON, et
al. and RACHEL AGOSTINI, et al.

IT IS SO ORDERED ON THIS
6th DAY OF MAY, 1996
[John Gleeson]
United States District Judge

Appendix A

Kevin T. Baine (KB 0710)
 Kevin M. Downey (KD 7356)
 WILLIAMS & CONNOLLY
 725 12th Street, N.W.
 Washington, DC 20005
 (202) 434-5010

Richard E. Donovan (RD 4388)
 KELLEY DRYE & WARREN
 101 Park Avenue
 New York, NY 10178
 (212) 808-7800

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
 BARBARA HRUSKA, MERYL A. SCHWARTZ,
 ROBERT H. SIDE and ALLEN H. ZELON,
Plaintiffs, 78 CV-1750 (JG)

v.

SECRETARY, UNITED STATES DEPARTMENT OF
 EDUCATION, CHANCELLOR OF THE BOARD OF
 EDUCATION OF THE CITY OF NEW YORK and THE
 BOARD OF EDUCATION OF THE SCHOOL DISTRICT
 OF THE CITY OF NEW YORK,
Defendants.

-and-

RACHEL AGOSTINI, et al.
Defendant-Intervenors.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

BETTY LOUISE FELTON, et al, CV 78-1750

Plaintiffs,

-against-

:

United States
Courthouse
Brooklyn,
New York

DEPARTMENT OF EDUCATION, et al,

Defendants.

:

May 9, 1996

----- x

2:00 o'clock p.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

STANLEY GELLER, ESQ.

For the Defendant:

NEW YORK CITY LAW
DEPARTMENT
100 Church Street

New York, N.Y. 10007

BY: MARILYN RICHTER
and PETER D.

WINEBRAKE

Assistant Corporation Counsel

WILLIAMS & CONNOLLY

725 Twelfth Street N.W.

Washington, D.C. 20005

BY: KEVIN T. BAINE,
ESQ. and EMMET T.
FLOOD, ESQ.

UNITED STATES

DEPARTMENT OF

JUSTICE

901 E. Street, N.W.

Washington, D. C. 20530

BY: W. SCOTT SIMPSON,
Assistant U.S. Attorney

Court Reporter:

Henry R. Shapiro

225 Cadman Plaza East

Brooklyn, New York

718-330-7687

Proceedings recorded by mechanical stenography, transcript
produced by computer.

THE CLERK: Civil cause for motion. Felton versus
Department of Education, et al, docket number CV 78-1850.

THE COURT: Please be seated.

State your appearances for the record.

MR. GELLER: Stanley Geller for the plaintiff.

MR. WINEBAKE: Peter Winebake and Marilyn Richter for the Chancellor and the City Board of Education.

MR. SIMPSON: Scott Simpson for the Secretary.

MR. BAINE: Kevin Baine for the intervenors Agostini, et al.

THE COURT: Sorry to keep you waiting. Do you want to be heard on your motion?

MR. WINEBAKE: Yes, your Honor.

I'm Assistant Corporation Counsel Peter Winebake. I'm here on behalf of the Chancellor of the City School District and the New York City Board of Education in support of our motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from Judge Neaher's 1985 order.

As Your Honor is aware, that order enjoined the city's school system from placing public school employees in parochial and other religious schools for purposes of giving instruction pursuant to the Chapter One program.

Your Honor, the reason that we made this motion, and it was made pursuant to the resolution passed by the Board of Education, they requested us to make a motion. The reason we're doing it, Your Honor, is because compliance with Judge Neaher's 1985 injunction, as I presume the Court is aware, has created extraordinary

financial burden on the City of New York and on the youngsters who attend school in the City of New York.

And, Your Honor, it's also put us in a situation wherein complying with the order, we've been forced to instruct youngsters who attend the parochial schools in a manner which is academically inferior to hands-on instruction by teachers in parochial school classrooms. Instead we've had to go forward with a hodgepodge of alternatives, such as the mobile instructional units, the use of leased space, the use of public schools.

And all of that has been presented to Your Honor in Ms. Weiss' affidavit, and I won't go into the burdens of the present system unless the Court would so desire.

THE COURT: Whatever you want to argue.

Let me make it easier for you. You really think I can help you out with the relief ordered by Judge Neaher without running right into the Supreme Court's decision on school education in the parochial schools?

You are not seriously asking me to just decide that issue on my own contrary to what the Supreme Court has decided, are you?

MR. WINEBRAKE: We're not asking you to directly overrule the Supreme Court. We understand that would be improper.

We also understand, Your Honor, that this is an extremely unique and unusual situation.

THE COURT: Why?

MR. WINEBRAKE: In a sense our hands are tied procedurally, and I will tell you why. This is an extraordinary situation because we're seeking relief from Judge Neaheer's order. And we concede that Judge Neaheer's order is the -- is entirely based on the Supreme Court's decision in *Agular* [sic].

If we were any other school district in the nation, Your Honor, based on the recent establishment clause in jurisprudence, I believe we'd be able to put public school teachers in a parochial classroom.

Unfortunately, Your Honor, because we operate under Judge Neaheer's injunction, we're not able to create a test case or to create any kind of a lawsuit by doing that. To do so would put us in contempt of court, and obviously that is not a reasonable alternative. So we've been forced--

THE COURT: It's not that unique. Aren't there a lot of situations that people can't go up the ladder and seek appellate review in the absence of placing themselves in contempt, such as an order to testify -- ordering someone to testify despite a claim of privilege?

MR. WINEBRAKE: I think it's unique. We happen to be -- we're in a situation where the Supreme Court, as we've noted -- we believe five justices of the Supreme Court have expressed a desire to overturn a previous Supreme Court decision. We operate under an order that is entirely based upon that same Supreme Court decision.

THE COURT: Here you are. And you are under Rule 60(b), and you hope that you get a vehicle, an order from me from which you can attempt to get the review or the reconsideration that you think five of those justices are

inclined to give this issue, fair enough?

MR. WINEBRAKE: That is correct.

THE COURT: You're not asking me to overrule the Supreme Court.

MR. WINEBRAKE: No, we're not.

THE COURT: You want a procedural device, yes?

Mr. Baine has suggested another procedural device which is a declaration in the other case.

MR. WINEBRAKE: Correct.

THE COURT: For the same purpose, I take it?

MR. WINEBRAKE: We dropped a footnote in your memo saying, if Your Honor felt a declaratory judgment proceeding was the more proper procedural vehicle, that we believe that our instant motion can be converted in a Rule 57 motion.

However, I just want to make it clear to the Court that it would be a lot cleaner if we were another school district, and we could simply put a public school teacher, you know, in one of the parochial schools and then an organization such as Mr. Geller's would sue us and seek an injunction and we'd be on our way.

But because of Judge Neaher's order, because we happen to be the party that was before the Supreme Court in the Agular [sic] case, we're unable to do that. That has kind of created this unique procedure situation.

THE COURT: I suppose the conundrum that you feel you face reflects sort of an appreciable respect for Judge Neaheer's order, because I don't think you face it really.

You made this Rule 60(b) motion. I will decide it. It seems to me, though, you and many other litigants in the same situation could have just put a public school teacher in the parochial school, I'm sure Mr. Geller would have been in here in a heartbeat with an order to show cause why you should not be held in contempt.

MR. GELLER: Less than a heartbeat.

THE COURT: You could have sought, I suppose, a stay of any sanction.

In any event, it's a long winded way of saying it reflects some admirable respect for the order of the Court.

Anything further?

MR. WINEBRAKE: I would quickly point out that what we're seeking here within Rule 60, we're seeking relief pursuant to Rule 60(b)(5). What we're essentially saying, Your Honor, is that under the Supreme Court decision in Ruffo [sic] versus Suffolk County Jail, the dissenting opinions in Kyrias Joel [sic] constitutes a significant change in the law under Rule 60(b).

THE COURT: Doesn't that argument sort of by itself defeat itself?

The last time I checked dissent means the people that lost.

MR. WINEBRAKE: The question becomes, Your Honor, whether those dissenting opinions, in light of other recent Supreme Court developments, such as the development in the *Zobrest* case and the *Rosenberger* case, you know, constitute a significant change in the law.

We've argued, Your Honor, and we've cited Supreme Court jurisdiction regarding the Supreme Court's willingness to overturn themselves in the proper case when they feel -- when they feel a constitutional issue had been incorrectly decided previously. The Supreme Court has always been willing to overturn themselves in those situations --

THE COURT: You want me to act as though that issue, which wasn't briefed in *Kyrias Joel*, wasn't briefed in *Rosenberger*, which the Court, at least two of the five justices on whom you purport to rely, wanted to reconsider, not overrule, you want me to act as though it was briefed and considered and they overruled *Agular* [sic]? How can I conceivably do that?

MR. WINEBRAKE: We think that is the primary factor for our argument. There has been a significant change in the law.

We also cite the Court, however, to *Zobrest* a case in which a sign language interpreter was permitted under the establishment clause to enter a parochial school classroom and the *Rosenberger* case, a Christian publication on a college campus was funded by a public university.

THE COURT: I read them. They both don't purport to overrule *Agular* [sic].

MR. WINEBRAKE: We concede that *Agular* [sic]

has not been explicitly overturned. This is mostly a procedure device. However, I do feel compelled to make an argument because I think it's a good faith argument, this is not a purely procedure device.

And I would just like to -- I would like to make the argument under all of the circumstances, and under all the circumstances we believe that this Court would possibly have the discretion to consider the recent jurisprudence and say there has been a significant change in the law here, even though the Supreme Court decision has not been explicitly overturned, that is only because the justices of the Supreme Court haven't been presented with a case in which they felt that they had the record to overturn it.

We believe it's inevitable, in light of everything that is going on, that the case will be overturned. And what we're seeking, Your Honor, is relief pursuant to Rule 60 because we really feel that every year that -- every year that we're forced to operate under this order, it's costing millions and millions of dollars and we seek immediate relief in our papers.

However, as we noted already, this is really the only procedural vehicle that we have to get up to the Second Circuit and eventually hopefully to the Supreme Court.

I would just make one more point, Your Honor. We feel that we also move, pursuant to Rule 60(b)(6) and in so doing we put in an extensive factual record. Because of that we feel that the Supreme Court in the instant matter would have a very adequate factual record upon which to reconsider the Aguilar [sic] decision. And for that reason, we also think this is an appropriate vehicle to go up on.

We'd ask the Court, if you are inclined to deny the motion, we'd respectfully request that you do so quickly so that we can move on. I thank you for your time.

THE COURT: Yes. Thank you.

MR. BAINE: If you don't mind, I will use the podium because I've never been accused of not speaking up loudly enough.

THE COURT: Keep your voice up.

MR. BAINE: Justice O'Connor said in her concurring opinion in *Kiryas Joel*, the Supreme Court should be prepared to reconsider *Aguilar* in a proper case.

It's our position that this is a proper case in which to invite reconsideration of *Aguilar*. It is the same case.

There are many advantages to seeking reconsideration of *Aguilar* in this case. There is a completely developed record. A record that was satisfactory to both sides last time, a record that was sufficient for the Supreme Court to resolve the issues.

Indeed ultimately, I believe that the City of New York would have to seek relief from this judgment in order to put teachers back on the premises of the parochial schools, even if the Supreme Court were to say in another case, *Aguilar* is hereby overruled, I think the City would have to come in here and file another 60(b) motion and ask for relief from the judgment. I think it's an appropriate vehicle, it's the proper case.

The Court has put its finger on the problem.

Obviously to some degree we're here speaking to the Supreme Court. I don't like to be in the position of speaking to a district court and saying, Your Honor, this argument is really addressed to the Supreme Court. I don't feel too badly, in effect, doing that here, because in this case it's the Supreme Court that put us in the predicament in the first place.

Indeed this Court, your predecessor, in our view, did the right thing. And it was the Supreme Court that essentially said the District Court was incorrect in permitting these teachers to go into the parochial schools and offer the services on premises.

Our position is simply this. This is a proper procedural vehicle. We have a substantial basis for arguing that the state of the law today truly is that on premises services do not violate the establishment clause as construed in the most recent cases announced by the Supreme Court.

There are really, I think, two issues before the Court. The first is the Rule 60(b) motion. Is there something procedurally defective about it? And the second question, how should the Court rule on it?

Should it grant or deny the motion, our position is the 60(b) motion is certainly a proper procedural vehicle to raise the issue. It perhaps is the best one.

There is no procedure under the federal rules to go to the Supreme Court and ask them to reconsider a decision. The proper procedure is to ask a District Court for relief first. And if the District Court on the merits denies the application, we can seek to appeal.

THE COURT: Defying the order is an option.

MR. BAINE: That is an option as well.

THE COURT: Takes the vagaries of whether the procedure is sufficient out of the picture, I take it --

MR. BAINE: It certainly does. It wouldn't be my client's decision whether to do that. My clients who are the parents of children accepting the services might --

THE COURT: You would like it just fine since your clients would not be fined or worse.

MR. BAINE: I could urge the City of New York to take that position, but I won't do it publicly if I do it. That is a proper procedural vehicle.

If the courts were to say Rule 60(b) is not available because of the passage of time, or it doesn't meet the criteria, doesn't fall within the ball park, you can't really come in there with a straight face and make the kinds of argument you need to make, it's not a procedure vehicle available to you.

And if the Court were to say that my alternative, request for declaratory judgment for some procedural reason is also defective, then I suspect the only way that the City of New York could seek the reconsideration that five justices have invited would be to put the City in contempt.

THE COURT: Let me ask you this. Is that decision whether Rule 60(b) is that the appropriate vehicle for appellate review? Is that something on which my decision

really has any bearing?

I mean, the question I'll have for Mr. Geller, is arises from his statement in his memorandum, the conclusion that says I shouldn't even entertain the motion. But I will ask Mr. Geller that question directly when he speaks.

But it seems to me there are really, although there are explanations for everything, there are two outcomes to this. One is granted, the other is denied. If it's denied, and in your memorandum you are a little more explicit, then the City defendants are about, the fact that you really can't get the relief you seek from me, and I take no offense at that. You can only get the relief that you seek from the Supreme Court.

If I deny this motion, is there anything about that denial one way or another that would effect whether the circuit or the Supreme Court will review this is procedurally right to revisit Aguilar? Do you understand my question?

MR. BAINE: Yes. I think if the Court were to deny the motion on the ground it was untimely, we'd have a problem. We'd not have a neat legal issue on appeal if the Court were to deny the motion on the ground it is not in timely --

THE COURT: Excuse me. If you are right and your colleague is right about how eager the Supreme Court is to review this, then you can just seek review of my determination that it was untimely, really.

MR. BAINE: Anything is possible in this case.

THE COURT: If you are right about how anxious

they are. Some District Judge's problem, how quickly you found this Rule 60(b).

MR. BAINE: There are all sorts of ways in which an appeal can be derailed by procedural arguments. Even a Justice who thinks this is an issue worthy of consideration might be uncomfortable making a decision if the decision below were on the ground it is untimely, and the technical issue on appeal, whether the Courts below abused their discretion in saying that the motion was untimely, then maybe there is not a nice legal issue. That's why it's posed the alternative.

THE COURT: The issues crop up more in the dissent than they do in the denial of a cert petition. I understand.

MR. BAINE: There is no secret agenda. We're trying to make a proper application that will be entertained on the merits so that the issue is framed and so if the Supreme Court was serious, they will have the opportunity to grant the cert petition. They can deny it if they choose.

That's why I think it's important for the Court to say, if it's so inclined, there is nothing improper about the motion as a procedural motion. It's not too late.

The grounds that are asserted are appropriate grounds, and the grounds asserted are, there has been a change in law, it hasn't reached to the point of explicitly overruling the decision of Aguilar, but there has been a change in establishment clause law that warrants judicial reconsideration of the injunction. Reconsideration by the courts.

That is an appropriate argument to make even if the

Court to, which you are addressing the argument feels constrained to reject it on the merits.

THE COURT: And when did the change in the law - and I have in mind the timing objection made by Mr. Geller -- when did the change in the law that prompted this 60(b) motion congeal to the point where the clock started running on the amount of time, whatever that is, that you have under Rule 16?

MR. BAINE: It was a gradual process that became clearer and clearer as more cases were decided. But the Kiryas Joel opinion was handed down in June 27, 1994. These motions were made in 1995.

And, so, yes, there was that delay of a year, but that is not undue delay. No one has been prejudiced. There is a serious decision that you have to make and the City of New York sits there and studies that opinion, it requires a board resolution, it requires a lot of serious thinking as to whether or not this is an appropriate thing to do to come back to the court that ordered you not to do something and ask that court for relief on the grounds that the decision that hasn't been explicitly overruled has been sufficiently undermined; this is a substantial motion.

I don't think anybody has been prejudiced by that year delay. So I do think that the motion is timely and I do think that what we're saying, not just to Your Honor, but we're saying to the courts is that this injunction can no longer be squared with controlling legal principles. And that if we're to look at and try to understand the evolution of establishment clause thinking that has gone on in the Supreme Court, the conclusion that compels itself is that there is nothing unconstitutional about sending public

employees who are supervised by public employees into a parochial school for the purposes of instructing children in a secular subject.

What the Supreme Court has said most pertinently is in the Zobrest opinion, when the government offers a neutral service -- no question this is a neutral service -- on the premises of a sectarian school, as part of a general program that is in no way viewed towards religion -- this is a general program -- it follows under prior decisions that provisions of that service does not offend the establishment clause.

There could be no clearer statement of the principle that we think governs this case. Utterly irreconcilable with the decision of the Supreme Court in *Aguilar*. You cannot square the two of them.

While I cannot say to Your Honor that the Supreme Court has overruled *Aguilar*, I can say that a majority opinion of the Supreme Court made that statement knowing that they had decided *Aguilar*. It's not they hadn't thought of a case like *Aguilar*. They had decided *Aguilar*. They knew it was on the books. They didn't talk about *Aguilar* in that opinion, but a majority of justices joined that statement.

THE COURT: What role does the doctrine of the law of the case play in this? Those words are found, I believe, only in your memorandum.

Would it be possible for the argument you make to be properly accepted by some other district court in some other case or maybe every other district court in every other case except this one, since this is *Aguilar*, and I would have to reject it because of the doctrine of law of the case?

MR. BAINE: I think there is no question that you're in a tougher position than any other court. If we make the motion in person, even though it's the same court in a different case, if there is a law of the case problem here, we can get around the law of the case problem there.

THE COURT: I think that means you're in a tougher position, not me.

MR. BAINE: I would accept that modification of my statement, yes. Principal tradition of law of the case would say that the law of this case as of today is that we can't send the teachers to the parochial schools. That is the law of this case today. And --

THE COURT: I can't change that by holding my finger up to the wind and reading concurrences and dissents even if nine of them had explicitly questioned Aguilar. The law of the case would prohibit me, if nothing else.

MR. BAINE: To this extent, this motion is, to my knowledge, unprecedented. I know of no case in which a court has grant or denied an application like this in which a party has come in and said, I know that we've been ordered not to do something, and we're ordered not to do something because the Supreme Court instructed the District Court to enter that order, and that would be regarded as the law of the case, but in other opinions the Supreme Court has said that was probably a wrong and erroneous thing to do.

So what I'm saying to you, and the only thing I can say, I'm looking for an exception to the law of the case. I recognize it's difficult for the Court to do that and the Court in this case, although I think it's a proper case to seek reconsideration, may feel constrained to say this is a proper

motion, the argument being there are exceptional circumstances warranting relief. I think a proper argument has been made, it's a substantial position on the merits.

I think there is good reason to believe that the defendants may be correct that the establishment clause as construed today can no longer support this construction. Having said that, I feel constrained by Aguilar to deny the motion. That may be the best that we can hope for here, and then the Supreme Court has the opportunity that it has asked for to reconsider the case.

The alternative, as I have said, and again the timeliness objection has been made on this one, but if the Court doesn't mind, I will address everything at once.

THE COURT: Let's make this clear, I don't have before me a motion to amend a pleading. You are about to refer to your declaratory judgment idea.

MR. BAINE: You don't.

THE COURT: I do want to hear from you now. I want to make it clear I don't have anything other than a request for a premotion conference in the other case. The Pearl case, correct?

MR. BAINE: That's correct.

Under the rules I felt that I had to ask for the conference before filing the motion. Quite frankly, I'm prepared to go back and think about the motion and confer with my colleagues about whether the motion is -- makes sense at this point, depending on what takes place today.

THE COURT: Having started the ball rolling, I want to ask you a couple of questions on it. This proposed new pleading which would seek declaratory relief on an issue that is not the issue in that other case, it's the issue in this case, what is the actual controversy under Section 2201, which creates the declaratory judgment remedy?

You would have to present to me for -- in order to get declaratory relief, an actual controversy. What is that controversy?

MR. BAINE: What we'd allege in such amended pleading is that were it not for the fact that the City of New York feels constrained by the Supreme Court's decision in Aguilar not to send -- by the injunction in this case -- not to send teachers onto the premises of parochial schools.

If a declaration were issued that that is not unconstitutional, we'd allege, the City of New York would do that. So when students and the parents, particularly the students whose parents are speaking on their behalf are being denied the most equitable -- most efficient, effective educational services that could be made available to them, services which the government would make available to them but for their understanding that the establishment clause precludes them from providing those services. We'd come in and say, we have standing because we want the services.

There is a controversy that involves a legal issue because our position is that we'd get the services, and we think the City would admit that they would provide the services if they were permitted to under the establishment clause.

And we have plaintiffs in that case, in Pearl, who

would provide the concrete adversity that is perhaps an essential ingredient of declaratory judgment action.

THE COURT: Wouldn't that relief, doesn't that boil down to your seeking a declaration from a District Court that a Supreme Court decision is no longer valid, a particular Supreme Court decision?

MR. BAINE: We're seeking a declaration it's not unconstitutional to put public teachers, public remedial teachers, on the premises of church related schools --

THE COURT: Which is the decision in Aguilar.

MR. BAINE: That's right.

And the Court may well say, I grant summary judgment to the other side on that, that issue has been decided by the Supreme Court, request for declaratory judgment denied. Judgment for the adverse party in the declaratory judgment case. You would deny by -- what we'd do --

THE COURT: I'm trying to think what this would mean. If you were to miss the deadline for reconsideration in the Supreme Court, one way to compensate for that might be to bring a declaratory judgment action, because you would have the controversy in that same sense and the adversity in that same sense. You would go back to that District Judge and ask that Judge to declare constitutional the conduct that was declared unconstitutional by the Supreme Court and then take that up.

MR. BAINE: And the Court would deny my request and the Court of Appeals would affirm and the Supreme

Court would deny cert and it would be a waste of time unless the Supreme Court were persuaded it made a dreadful mistake. It could deny cert still.

THE COURT: Does that seem right to you? Does that seem the way a declaratory judgment act was designed to be used, to get District Judges to declare wrong old Supreme Court cases based on intervening comments?

MR. BAINE: When the Court raised the question of the immediate application in the District Court, rather than making your timely motion for reconsideration in the Supreme Court, I think one might question whether such an application could be made in good faith.

There may well be sanctions attending that kind of filing, but here we have five justices that invited the reconsideration. We're just trying to find a way.

In answer to the question is that an appropriate way to go about trying to overrule precedents, I think it is. I think a party that finds its conduct constrained by a Supreme Court case that no longer commands a majority -- let's say we were in 1953 and dealing with *Plessy v Ferguson* [sic], you know, separate but equal facilities are violations of the Fourteenth Amendment. Let's file a complaint for declaratory judgment.

And we recognize the District Court may well feel it has to deny it under the authority of *Plessy v Ferguson*, that is a way to get that issue before the Court again now that we can read the intervening doctrinal changes and see today the case would come out differently.

Brown versus Board of Education, I don't know if it

was a declaratory judgment action or not, it may well have been, but certainly could have been. So I don't think it's inappropriate use --

THE COURT: You folks are steeped in this, not just in this case, but others, and are more familiar what is out there with respect to cases like this, and I am certain there are other cases percolating their way up, whether they are in the classroom instruction cases or these other cases that are more like Pearl on which reliance has been placed on Pearl?

MR. BAINE: There is Pearl itself. In that case -- to some degree the plaintiff's position is, well, the Supreme Court can take a case like Pearl, if it wants, and can overrule Aguilar.

But of course in Pearl what is being asked is -- by the plaintiffs is that Aguilar be extended. And we're saying, don't extend Aguilar. And if the Court were to agree with us and say without regard to whether Aguilar would be reaffirmed by the Supreme Court, no reason to extend it. If we were to prevail in the Court of Appeals, the issue would not get to the Supreme Court. Those kinds of cases would not result in the case being brought before the Supreme Court.

THE COURT: Any other cases of other districts sensing the winds are blowing in a different direction the way you're sensing to use these federal funds to put teachers in parochial schools?

MR. BAINE: Not in the Title One.

MR. WINEBRAKE: In the Helm case.

THE COURT: What is the status of that case?

MR. BAINE: It's awaiting decision --

MR. WINEBRAKE: Your Honor, one of the -- we contacted the attorneys. We were contemplating making this motion because we were hopeful that the Helm case would be working its way up.

We'd be willing to sit back and wait. That case is before the Fifth Circuit Court of Appeals, but the last I checked, which was four or five months ago, nothing had -- hadn't been moving through the system.

It's brought in a different context than -- there is a lot of procedural problems in that case too. We didn't feel it was very hopeful that case was going to really percolate up very fast.

We did a search for any other kinds of other cases and we could not find anything, that concern Chapter One, which is the same situation as we have in Aguilar, aside from the Helm case. But the last I checked, they were seeking appeal of the Fifth Circuit in Helm, and the attorney didn't sound very hopeful it was going to fly through.

THE COURT: What about the other cases that deal with Chapter One. But not within the classroom instruction which deal with circumstances like in Pearl? Have any of them gone to the Supreme Court?

MR. BAINE: There have been cases decided upholding the kinds of alternatives that the Court is considering in the Pearl case. In the Sixth, Seventh, the

Eighth and the Ninth Circuit, and in none of those cases did the plaintiffs who were challenging the programs seek cert. That's what has happened in the past. And I think I had made reference to that the last time we were here.

THE COURT: I think I offered to rule against you. I remember that.

MR. BAINE: There has been some willingness to the side of defendants and intervenors and defendants to be a little patient in recognition that all of these cases are in all these different circumstances. That maybe one will provide a second vehicle.

One of the things that has happened, all the cases have gone in favor of the defendants and not brought to the Supreme Court. And the other thing that happened, in the Kiryas Joel case, in which the issue was not presented in which the Court was faced with a rather unusual response to Aguilar that prompted a number of justices to say, we understand why you felt you had to do this, we put you in that awkward situation and we think Aguilar should be reconsidered. But the thing you chose to do doesn't square with the establishment clause.

In that case for the first time five justices said what we always suspected that they would say, that they thought Aguilar was wrong --

THE COURT: Did they say that?

MR. BAINE: Four said they thought it was wrong. Kennedy said it may have been wrong.

THE COURT: Kennedy never had the benefit of the

full briefing on that issue.

MR. BAINE: Only three of them have, three of the justices from Aguilar are still on the court. Stevens, the Chief Justice, and Justice O'Connor.

THE COURT: The chief justice doesn't need the brief.

MR. BAINE: So maybe the statement they would have to take steps backwards to rule the other way.

THE COURT: Thank you.

Do you want to switch sides?

MR. SIMPSON: Before the argument today, Mr. Baine said I should be in the middle. I guess in a sense we are. I'll be very, very brief in this point. Although I probably would like to have a little rebuttal.

The Secretary of Education concurs in the concerns that led the Board and the intervenors to file the motions. We recognize that the Supreme Court's decision in this case has caused serious problems in the Title One program. And those problems effect both private school students and public school students.

I think one of the problems that most troubles the Secretary of Education along these lines is the fact that a portion of the funds that are being spent in Title One never reaches the students as educational benefits. The cost of the post-Aguilar [sic] delivery methods. The Secretary supports efforts to have the Supreme Court reconsider its decision in

the Aguirre case.

Slightly different point, so that we're not misunderstood as to what we said in the written response, in this response, a little to some of the things Mr. Geller said in his papers, in a sense using our response in his favor. We concur in the Board's and the intervenors' position that this court can and should decide these motions for relief of judgment.

Although we believe the Court is not free to grant the motions, we feel that the Court can and should decide them. We disagree with Mr. Geller's position that the Court should not even entertain the motions. So we urge the Court to decide these motions.

THE COURT: To deny them?

MR. SIMPSON: Well, I guess that's the inevitable result. We feel the Court cannot grant them and we urge the Court to decide them.

THE COURT: Mr. Geller.

MR. GELLER: I feel maybe I should say nothing because it appears that at least I may be far ahead, and I was always told that was the point at which you should grab your briefcase and walk out of court.

THE COURT: Very few lawyers that can do that.

MR. GELLER: I assume Your Honor is still considering some issues here, and I hesitate just to walk out of the court.

What bothers me, and what confuses me is a distinction that the defendants try to impress upon you that although you cannot overrule the United States Supreme Court, you can say in this case that Rule 60(b) is a proper vehicle for what they are seeking to do.

That has been said again and again and no one has rationalized it. If Aguilar is the law of the land because it has not been overruled, how can a Rule 60(b) motion be a promotion for relief from Aguilar?

And it's clear that going -- bringing a proceeding to gain relief from Judge Neaheer's judgment as the injunctive part of the judgment is really a ploy.

Judge Neaheer was ordered -- ordered by the Court of Appeals, which had been affirmed by the United States Supreme Court to hand down that injunction and to declare - - in Judge Neaheer's decision -- to declare that on-premises teaching and counseling is unconstitutional. With that in mind, 60(b) cannot be a proper vehicle.

THE COURT: Let me interrupt you for a second, respectfully. I don't want to put you in a position where you give your adversaries advice.

What else are they supposed to do? The Supreme Court agreed with you back then in Aguilar, yet there is no denying there is a substantial number, and five is the magic number for our purposes or their purposes. Substantial number of justices that at the very least want to reconsider the Court's decision in Aguilar.

All they are trying to do is give them that opportunity, so whether it's 60(b) -- I'm not suggesting that

you give them advice -- but why shouldn't I agree with you and say denied, I can't overrule Aguilar, and give them the opportunity to fight it out with you one more time up the appellate ladder?

MR. GELLER: I think you stated all the reasons. One is because this is the District Court in which Aguilar was decided in, which the injunction was issued, and because you have the mandate of the United States Supreme Court, and you have it as the law of the case, you cannot give this kind of relief.

THE COURT: What is it you want me to do? How do you want me to decide this motion?

MR. GELLER: I don't think you should even entertain it.

THE COURT: Tell me what that means.

MR. GELLER: It's clearly outside your power. It's filed. It's filed in the District Court.

THE COURT: What do you want me to do, not decide it?

MR. GELLER: If you deny it because of the fact that you cannot overrule the United States Supreme Court, which you have indicated, and because 60(b) is not a proper vehicle for your doing so, then I would think that the Second Circuit would give this matter short shift.

And I think even the judges who are opposed to the plaintiff's position in the United States Supreme Court would give the matter a short shift if they had concern, as I think

they do, for proper procedure, for the proper use of Rule 60(b), and the proper way to bring a case to the United States Supreme Court.

I have enough faith, at least in Justices Kennedy and O'Connor, that they would not accept this as a proper vehicle for overruling Aguilar.

THE COURT: Suppose the City -- forgive me for interrupting. You have lots of ideas in what you say and I don't want to lose sight of them.

Suppose the City were to just go ahead and put one teacher in one parochial school, is that what they have to do in order to frame this issue procedurally in a way that they can do to give the Supreme Court --

MR. GELLER: Far be it for me to suggest what they have to do. My background teaches me if there was a law on the books that was so detrimental to my state, my city, my country, I would say, okay, I may be held in contempt of court, but I'm going to see to it that that law is overruled.

This wonderful restraint that the City shows is perhaps admirable, but Your Honor has suggested that that is one way. I don't counsel it.

I make this other point --

THE COURT: Should I decide the 60(b) in a motion in a way that sends the message that unless you violate a court order you can't get review of a ruling? Shouldn't I -- isn't there a certain respect in which maybe they should be commended for coming in under 60(b) rather than doing

what would clearly get review in being in contempt of Judge Neaher's order and have me judge them in civil contempt?

MR. GELLER: I don't think so, but I want to make one other point. The ruling in Aguilar, as far as I understand it, has been followed in 50 states. 50 states, and 49 of them are not under any injunction whatsoever.

And yet as far as I know, I'm not familiar with the Helm case that the other side mentioned, but I don't believe any other school district board has seen fit without having to risk being held in contempt to send a public school teacher into a religious or parochial school.

It's rather remarkable -- New York City is the only - only district -- or the Chancellor and the Board of Education is the only school district board in the entire country that feels that it needs relief from Aguilar.

THE COURT: Which way does that cut? Doesn't that suggest that unless I give them a vehicle to have this issue get decided once and for all, again, that it's never going to get decided even though the Supreme Court wants to revisit it?

MR. GELLER: If you have to make a decision, because you don't want to distort the entire -- it's more substantive as well as procedural law of the land -- yes, I would say, yes, that is your duty.

Just consider, Your Honor, if this were a proper vehicle or the declaratory judgment motion, I would like to get to that, that is suggested by Mr. Baine and the intervenors, if that were -- if those means were proper, can't imagine how many hundreds, may be thousands of state and

even federal courts would have challenged the Brown against Board of Education or -- I don't know what other -- just to say we need relief from these, or we should get another ruling on the chance that sufficient number of judges in a changed court would overrule the prior decision.

THE COURT: Isn't it true, though, if you change the facts, you might change what the outcome is? There never have been five or even three justices of the Supreme Court that have explicitly questioned Brown versus Board of Education, much less called for it to be overruled forthwith.

Aren't these folks in a different setting? I mean, they have a good faith basis, it seems to me to want to posture the issue in a way that they can get the review that the Supreme Court seems to have -- at least five members of the Supreme Court seem to invite.

Isn't that a different set of circumstances?

MR. GELLER: I'm not so sure you are entirely correct from reading Judge Friendly's decision in the Second Circuit in this case. He mentioned another case, in which apparently the justices of the court had indicated that they might decide the law in a different way.

But I don't think that a Rule 60(b) motion or a declaratory judgment motion is the proper case that even the five justices to which we're referring referred when they said -- Aguilar should be reviewed in a proper case.

THE COURT: Is there a way to properly put that issue before them in this case?

MR. GELLER: In this case, no. Not in this case --

nor in Pearl --

THE COURT: Let me take baby steps on the question. If they were held in contempt of Judge Neaher's order, wouldn't they then be able to appeal that and seek review of the very issue that they want me to address on this 60(b) motion?

MR. GELLER: If they were held in contempt?

THE COURT: Yes.

MR. GELLER: I suppose they would. You could appeal, although that might be decided -- I don't want to prejudge this against my own interests. I don't know what would happen if you actually brought -- decided -- the Board decided to send a public school teacher, giving Chapter One instruction into a religious school in this city, and then we moved as we would to hold them in contempt, whether that would precisely raise the issue that they want to raise before the United States Supreme Court. But, probably would, if I were to be perfectly frank, I think that it would.

That is another point. In none of the papers that I have filed for the plaintiffs in this case have I had occasion, and therefore have I actually argued the merits either on the facts or the law of the proposition that it is constitutional, permissible to send a public school teacher into a religious school.

It was stated by, I think by Mr. Baine, that all of this has been briefed. It has not been briefed. There is nothing in the 90 -- 60(b) cases that briefs the point that they want to have briefed, and that is the merits of the proposition

whether it's constitutional to send a public school teacher into a religious school. That has not been briefed.

They have all sorts of facts in the declaration of Ms. Weiss in which she states how expensive and burdensome it is, because long ago Judge Friendly said, of course when we decide the case as the Second Circuit decided it in *Felton*, which became *Aguilar*, the Second Circuit, and it was a unanimous decision said, we know it's going to be much more expensive, but that doesn't matter. We haven't had a chance in the 60(b) motion, nor would we in a declaratory judgment motion.

But I would like to address myself to the declaratory judgment motion. It was stated by Mr. Baine, I think I quote him, it would be a waste of time to, in effect, to make the motion for a declaratory judgment in the sense that you would immediately deny it. But that's one of the three bases, as I understand it, for not allowing a motion to amend.

If the motion to amend is granted and that would be futile, as Mr. Baine indicates he knows it would be because you would not overrule the United States Supreme Court, then the motion to amend should be denied as futile, period.

And it -- that too would not be a vehicle any more than the Rule 60(b) motion.

THE COURT: How is the law supposed to change, though? Why shouldn't people -- the only example leaps to mind is in *Monell* when the Supreme Court held a municipality can be a person under 1983.

The way it gets up there by people making arguments

below that they know are going to lose so that they can get the Supreme Court review of it.

Why shouldn't I permit that to happen?

MR. GELLER: You must understand that I don't, and my clients don't believe the law should be changed at all. How is the law to be changed because four Judges have indicated --

THE COURT: I have a more generic question. Isn't there a way the law grows to allow people to make arguments to lower courts like me that they know will lose so that they can preserve the issue?

If they are not allowed to make the arguments, by the time they get to the Circuit or to the Supreme Court, your argument is they have defaulted by not having raised it in The District Court.

Isn't it permissible to let them make arguments, as you say they know they'll lose, so that they can have an opportunity to have the law in its natural way get tested and maybe agree or not agree?

MR. GELLER: I think we have a concession. It was Mr. Baine also arguing that he acknowledged that, and I think the other counsel have acknowledged that the Rule 60(b) motion has never, never been used before, nor do I believe that the declaratory judgment procedure has ever been used to enable a District Court to overrule the Supreme Court and have the case go up that way.

All I'm asking is that you follow the normal procedure, within which neither the Rule 60(b) motion nor

the declaratory judgment suggestion, because it's not a motion yet, does not fall. They are outside accepted practice for getting a case before the United States Supreme Court.

THE COURT: Doesn't that produce sort of an ironic result, which is that the very people who got into this dispute to begin with, the City and the Chancellor, and the defendant intervenors, are they the only ones who are now interested in the issue, who can't get it reviewed because anyone else around the country, any other school board can simply put a public school teacher in a parochial school, have it litigated, have the issue go up, and the result of what you say is that the very people who started this dispute, and for all I can tell, may have the keenest interest in it, the largest school boards in the country are the ones who are now procedurally barred from getting appellate review or Supreme Court review of it, short of denying a lawful order of the Court? Is that the result of your argument?

MR. GELLER: It kinds of twists the position a little bit. They only got themselves in this spot because the plaintiffs in Felton brought this case to start with.

And then I come to another point that I overlooked, and then what the United States Supreme Court said was simply, no, you can't have a public school teacher and counselor go on to the premises of religious schools. Period.

The Court didn't say what else they can do. But what New York City has done --

THE COURT: Short of having themselves held in contempt, it's your position that they cannot get appellate scrutiny of the issue decided in Aguilar?

MR. GELLER: Yes. And I think that is proper. First of all, I think it's still the law of the land, but secondly, as I was just now arguing, they're the only school district that has placed itself in the absurd position of spending so much money that they cannot -- that they need financial relief from Aguilar. They are the only ones.

They somehow got themselves into a ridiculous contract for the MI use at an expense that is fairly greater than any other school district board. But all of their expenses are completely out of wack.

And I repeat, they are the only board that even thinks of seeking relief from Aguilar.

THE COURT: But your position was that the expenses are irrelevant. Whatever they are, whether they are prudent or bad, they are a necessary consequence of the constitutional determination made by the Supreme Court?

MR. GELLER: Yes.

THE COURT: Let's not worry about whether there are good people, good contracts involved.

MR. GELLER: That is the excuse in the Rule 60(b) motion.

May I say one thing? This argument that somehow the Rule 60(b) motion procedure is proper, as I read 60(b), there is one way in which you can utilize 60(b) to get relief with respect to a change in the law, and I think that is in 60(b)(5) which says if the change is a result of a decision being vacated or overruled.

THE COURT: Or it's no longer equitable that the judgment should have prospective application.

MR. GELLER: I don't think that would apply in the case of a mandate. So that is why they seize upon the injunction provision in Judge Neahe's final judgment and overlook the declaratory part of the judgment which states that it is constitutionally impermissible to send public school teachers into religious schools. That equitable argument is not available to them.

The only thing that is available to them, and they argue it, is change in the law. And the change of the law specified in Rule 60(b) is that the change where there has been a judgment that has been reversed or vacated, or I would add, overruled. This is not proper procedure.

One other argument with respect to the declaratory judgment, or maybe two, it's long past the time. I don't know what stage your decision is at on the motion for summary judgment. It's as if somebody were asking to amend their pleadings after the case had gone to trial.

THE COURT: On that score, let's -- I don't mean to curtail your argument. I understood Mr. Baine to suggest that he's going to go back to the drawing board and speak to his colleague. We may not have that motion. Am I correct about that?

MR. BAINE: Your Honor, I certainly, at the conclusion of this hearing, I will confer with everybody and decide whether to file the motion, and at that time we can argue whether it's untimely. I'm prepared to address that today, if the Court wants it. We haven't filed it yet, and under the rules, I think we have to have a conference before

we file it.

THE COURT: Just so it's clear, there is no reason for you to know it, a pre-motion conference is not a motion to make a motion. I can't stop them from making the motion. I have no intention to. If it's your desire to make the motion, Mr. Baine, just once you finalize that, contact Ms. Virno for a motion schedule.

For what its worth, having thought this through a little bit -- and this is by no means a ruling on the motion, it's not briefed, I haven't had the benefit of briefing on it, but it does strike me as an odd use of the declaratory judgment statute.

More importantly, the concern alluded to by Mr. Geller to, the timeliness of it, wholly apart from whether you can use the declaratory judgment statute to get a District Judge basically to overrule a Supreme Court decision. That timeliness factors strikes me as one that's worthy of considerable weight in your ultimate decision whether to file the motion.

MR. GELLER: I would also stress the futility aspect. It has been conceded that you would deny the motion on the grounds that you cannot --

THE COURT: There is no distinction as to an issue whether it's constitutionally permissible for a public school teacher to go to the premises of religious schools, and the issue whether Aguilar should stand or fall. Mr. Baine words it in the former way, but it's the same.

Why does futility matter? I don't think we should belabor the issue. You mentioned this before and I'm not

sure why futility matters.

How many times in 1983 did plaintiffs try to, in what was a futile gesture before Monell, try to bring in municipal defendants under 1983 until Monell got decided?

And it seems to me plain that folks ought to be allowed to seek relief that may be precluded by the case law if for no other reason than to preserve the issue.

So futility, again, if the motion is filed and you breach it with an open mind, I will listen to your arguments. I think it's helpful to the present motion conferences to share our preliminary thoughts and my preliminary thought on the futility issue, it's not a very weighty concern.

MR. GELLER: The only reason I make it and have a practical reason, on a motion to amend I understand that futility is a powerful argument. That would not stop them from starting a new action for declaratory judgment.

But if they started a new action for declaratory judgment, I would have all the rights of a defendant, or my clients would in that action with respect to discovery, so we can get into on the merits on the facts and on the law the issue as to whether it should be constitutionally permissible to send public school teachers into religious schools.

THE COURT: You have done all of that.

MR. GELLER: I never argued the merits of Aguilar.

THE COURT: I'm not talking about arguing the merits. I'm talking about discovery. What discovery?

MR. GELLER: The discovery has been only to the financial aspects of the present plan.

THE COURT: Let me do this. Let's get back to the motion that is on the table. If you have anything further, as to the declaratory judgment, the proposed -- the prospective motion for leave to amend to assert a claim for declaratory judgment, we'll wait and see whether it's filed.

You will take into account, for whatever it's worth, our discussion here today. If it's filed, you will get a schedule from Ms. Virno. I will read the briefs carefully and we'll have argument on it.

Anything further with respect to the Rule 60(b) motion, Mr. Geller?

MR. GELLER: No, Your Honor.

THE COURT: I have one more question for you.

I'm not sure precisely what it is if you were to prevail on this motion, precisely what it is you want the order to say. And my confusion arises from your request that I should not entertain the motion.

MR. GELLER: Well, I think my point, in the most dramatic way, is that you should deny the motion on the grounds that you do not have the -- two grounds, you do not have the power to overrule the mandate of the United States Supreme Court.

And, number two, 60(b) is not a proper vehicle for you doing so, in any event. That would deny the motion on its clear procedural grounds, which is the way I would like

it to go up. Because then I don't think even the majority on the Supreme Court would touch it, because they would not want to distort the procedure law of the land, or the common law, for that matter.

THE COURT: Thank you, sir.

MR. BAINE: Your Honor, may I make one brief comment?

THE COURT: Yes.

MR. BAINE: I've been thinking about a question that you asked me. I'm not sure that I gave a complete answer. The question of the alternative of citing, putting the City into contempt. I think it's an interesting issue and would warrant further research.

I'm not actually sure that the City could be confident of framing the legal issue on appeal by putting itself in contempt because of the collateral bar rule which says you may not disobey a court order and defend the contempt judgment on the ground that the order was unlawful. You must seek review of the order. And I don't know how that works in this case because I haven't thought it through.

It's not obvious that you can disobey an injunction, put yourself in contempt and appeal the contempt -- the contempt order on the ground that the underlying order that you violated was unlawful in general. The collateral bar rule says you may not do that. It's not clear that the contempt avenue is open to the City. Further underscoring the importance of providing --

THE COURT: But they did challenge that order,

though, right?

MR. BAINE: It's why it's a kind of novel question. We'd argue that you could appeal the contempt order on the ground --

THE COURT: Otherwise they're really in a box without -- if Mr. Geller is right -- they are in a box without any way out.

MR. BAINE: I don't think it's obvious it can be appealed on the ground the underlying record is no longer valid. It would be a unique twist to the collateral bar rule.

THE COURT: It's an excellent point. You might find yourself being held in contempt of an order that is based on precedent, that it's now obsolete, that doesn't alter the validity of the order.

Even if the order itself were illegal, you could be held in contempt.

MR. BAINE: My response is that it's only open to you when there is an opportunity for review, but I don't think the answer is obvious.

THE COURT: Let me ask counsel for the City defendants -- I was looking for -- where was the resolution attached -- I read the resolution.

MR. WINEBRAKE: Attached as Exhibit 2 to the Weiss affidavit, Your Honor. It is summarized in the memo of law.

MR. GELLER: It's asking Your Honor to overturn a decision of the United States Supreme Court.

THE COURT: I might have posed this question to the wrong person. What is the Board's position on when the developing case law, and I'm directing you to the timeliness of the 60(b) motion, what's the Board's position as to when the developing case law congealed to the point where it could properly come back before a court and seek relief from the Aguilar decision?

MR. WINEBRAKE: Your Honor, as I think Mr. Baine put it best when he said that process began of course on the date in the summer of '94 when the Kiryas Joel case was decided. This case was made public. The dissents were made public at that time. There were subsequent developments in which this idea, in which this neutrality principle --

THE COURT: When was Rosenberger decided?

MR. WINEBRAKE: The Zobrest case, Your Honor.

THE COURT: When was Rosenberger decided?

MR. WINEBRAKE: In 1995.

MR. BAINE: June 29, 1995.

THE COURT: It's after this resolution.

MR. WINEBRAKE: Zobrest was decided before the resolution.

Your Honor, there is a couple of other -- with regard to the timeliness, there are a couple of other factors that the Court should consider. This, as you can imagine, was a politically sensitive matter with the Board. And there was

obviously -- this didn't just all emerge in the summer of 1995. There was a lot of -- there was a lot of back and forth between the legal counsel to the Board of Ed and the legal counsel to the Chancellor and various factions within the seven member Board of Education concerning whether the City of New York wanted to take a public position whereby we'd seek reversal of this case. One person abstained. One person descended from the resolution, and five Board members voted in favor of the resolution. However, you know, an issue like this does take several months to kind of work itself -- to work itself to a resolution. That's a factor that I think the Court should consider.

In rehearing the propriety of the Rule 60 motion, we felt in a situation like this, it's really hard -- it's really hard to pinpoint the date at which the change in the law, you know, is manifested.

We'd ask that the Court consider that, first of all, it took several months for the Law Department as well as the Board of Ed's legal staff to understand the implication of the Kiryas Joel decision. There were then subsequent jurisprudence decisions that were considered.

There were a lot of political -- a lot of political back and forth between various factions and interest. I really feel, Your Honor, that the fact that we were able to pass a resolution just about exactly one year from the date that the Kiryas Joel decision came down, given that -- it's actually very reasonable, and I believe people at the Board worked hard on that.

Also, the Board during the summer months is not as

active. We acted promptly and expeditiously. The Board carefully studied what it was doing before it voted on the resolution.

I don't think it's unreasonable for a matter of this constitutional importance took a year.

THE COURT: Thank you. Thank you all. I'm going to take the motion under advisement.

MS. RICHTER: Since you sort of considered the prehearing conference on the proposed motion on the declaratory judgment together with the argument on the Rule 60(b), I wanted to add something in terms of the concern of both the defendants, City, the Board of Education, the Chancellor and the State of New York, who is not here today because they are not parties to the Felton matter, although they are parties to the Pearl matter in which the proposed motion would be made, and I'm authorized to speak for them as well.

Again, this is not on the substance, but it was just on the procedural issues. I thought perhaps it would clarify our position if we knew what the procedural aspects of this, or implications of Mr. Baine's proposal motion might be.

Our concern is that if Mr. Baine does make his motion, not to delay the decision in the motion now before you, and because that is a procedural issue rather than substantive issue, I was wondering if the context of the pre-motion conference you could give us some guidance as to that we'll know what position to take in an informed way in terms of Mr. Baine's proposal.

THE COURT: I think I understand your question, if

that is a question.

I have before me in the other case a motion for summary judgment. I have before me this 60(b) motion. None -- the resolution of neither of those depends in any respect on whether Mr. Baine's files his motion or when.

In fact, if there is a resolution of either or both, the timing of that may effect whether he chooses to file. But you will seek your own counsel as to how to proceed. I will not give you advice. I will not tell you when I'm going to decide the two motions that I have under submission.

I will say this, I'm sensitive to the need -- sensitive at least to the desire for a speedy resolution of the 60(b) motion -- and sensitive, generally speaking, to the desire of people to have their cases decided and not sat on by District Judges.

That's a long-winded way of saying, do what you will with regard to your anticipated or prospective declaratory judgment -- motion to amend the pleadings, but it won't have any bearing on the resolution of these other motions that are pending.

Does that answer your question?

MS. RICHTER: I think so.

THE COURT: If it doesn't, follow up. I don't mean to be skeptic. I didn't exactly understand your question, to be honest with you.

MS. RICHTER: I think you were answering my question. The question concerns not any bearing that the

proposed motion might have on the determination in terms of the outcome. It's just a question about the timing of the decision that we now have the Pearl motion, the 60(b) motion and the proposed motion. And our concern is that the proposed motion may impact on the 60(b) motion so as to delay that determination.

THE COURT: Okay.

MS. RICHTER: As you recognize, we have an interest --

THE COURT: I thought I answered that. No, it will have no bearing on the resolution of these two other motions or the timing thereof.

MS. RICHTER: Thank you.

THE COURT: Thank you everyone.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL
A. SCHWARTZ, ROBERT H.
SIDE and ALLEN H.
ZELON,

NOTICE OF APPEAL

78- CV-1750 (JG)

Plaintiffs,

- against -

SECRETARY, U.S. DEPARTMENT
OF EDUCATION, CHANCELLOR
OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK
and BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT OF
THE CITY OF NEW YORK,

Defendants,

RACHEL AGOSTINI, et al.,

Defendant-Intervenors

-----X

PLEASE TAKE NOTICE that Defendants Chancellor
and the Board of Education hereby appeal to the United

States Court of Appeals for the Second Circuit, from the order and memorandum decision (one paper) of the Honorable John Gleeson herein dated May 20, 1996 and entered in the Docket on or about the same date, which denied defendant's motion seeking relief from the injunction issued September 26, 1985 enjoining the New York City Board of Education from using Chapter I funds to send teachers and guidance counselors into private schools (majority being religious schools), and this appeal is taken from each and every part of said order and memorandum decision (one paper) as well as from the whole thereof.

Dated: New York, New York
June 5, 1996

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA,
MERYL A.SCHWARTZ,
ROBERT H. SIDE
and ALLEN H.
ZELON,

Plaintiffs,

78-CV-1750 (JG)

-against-

CROSS-NOTICE OF
APPEAL

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION,
CHANCELLOR OF THE
BOARD OF EDUCATION
OF THE CITY OF NEW YORK
and BOARD OF EDUCATION OF
THE CITY SCHOOL
DISTRICT OF THE CITY
OF NEW YORK,
Defendants,

-and-

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

Please take notice that plaintiffs appeal to the United States Court of Appeals for the Second Circuit from so much of the order and memorandum decision in this action made

by the Honorable John Gleeson, dated May 20, 1996, and entered in the docket on or about the same date, as determined (1) that the defendant Board of Education of the City School District of the City of New York ("Municipal defendant") and, by implication, the defendant-intervenors may properly proceed under Rule 60(b) of the Federal Rules of Civil Procedure to seek relief from the judgment entered herein of the Honorable Edward R. Neaher, dated September 26, 1985, pursuant to the mandate of the United States Supreme Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), (2) that the Municipal defendant and defendant-intervenors may by motion under Rule 60(b) properly seek review of the determination of the United States Supreme Court in *Aguilar v. Felton*, *supra*, (3) that the Municipal defendant and defendants-intervenors may properly seek review of the underlying merits of *Aguilar v. Felton*, *supra*, on the basis of the record made on their motions under Rule 60(b) herein, (4) that the Municipal defendant and defendant-intervenors are entitled to the relief they seek in their motions under Rule 60(b) without a plenary hearing of the issues raised below with respect to the alleged need for such relief, and (5) that the motions made by the Municipal defendant and defendant-intervenors herein were properly determined "on the merits", as opposed to their having been denied *ab initio* on procedural and jurisdictional grounds.

Dated: June 17, 1996

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BETTY-LOUISE FELTON,
CHARLOTTE GREEN,
BARBARA HRUSKA,
MERYL A. SCHWARTZ,
ROBERT H. SIDE
and ALLEN H. ZELON,

NOTICE OF APPEAL

Plaintiffs,

78 CV-1750 (JG)

-against-

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION,
CHANCELLOR OF THE
BOARD OF EDUCATION
OF THE CITY OF NEW YORK
and BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT
OF THE CITY OF NEW YORK,

Defendants.

and .

RACHEL AGOSTINI, MARIA
COSARCA, DIGNA DURAN,
IVETTE ENCARNATION, MARIA
L. FERNANDEZ, DOLLY CUTRERA
THEN and JOSEPH M. THEN,
MARGARET FIGUEROA, MICHELE
GALLO, MARIE SEJOUR, JOAN
JACKSON, CHERYL MALCOUSU,

TONYA STEVENS, and
ROSEMARIE VASQUEZ,
Defendant-Intervenors.

PLEASE TAKE NOTICE that Defendant-Intervenors Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and Rosemarie Vasquez hereby appeal to the United States Court of Appeals for the Second Circuit, from the order and memorandum decision (one paper) of the Honorable John Gleeson herein dated May 20, 1996 and entered in the docket on or about the same date, which denied Defendant-Intervenors' motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from this Court's Judgment, dated September 26, 1985. This appeal is taken from each and every part of said order and memorandum decision (one paper) as well as from the whole thereof.

Dated: New York, New York
 June 17, 1996

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